No. 76-316

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN R. BATES AND VAN O'STEEN, APPELLANTS

v.

STATE BAR OF ARIZONA

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

More than six years ago the United States initiated a program of antitrust enforcement directed at restraints of trade in the commercial aspects of various professions and other providers of personal services.[1] The United States has instituted Sherman Act

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[1] See, *e.g.*, McLaren, *Antitrust—The Year Past and The Year Ahead*, 1970 N.Y. State Bar Ass'n Antitrust L. Sym. 15, 23; *An Interview With Richard W. McLaren, Assistant Attorney General, Antitrust Division*, 39 ABA Antitrust L.J. 368, 377 (1970); Hearings on Legal Fees before the Subcommittee on Representation of Citizens Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., Part I, 164-165 (1970).

cases challenging "ethical" restraints upon price competition promulgated by professional associations of lawyers, engineers, architects, accountants, and realtors.[2] Regrettably, however, the prohibition of private price fixing among providers of professional services, see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, will not necessarily provide the public with the benefits of competition. As a practical matter, meaningful competition in the professions is often severely hampered by various "ethical" restrictions on the ability of members of the profession to make known to the public information concerning their prices, their qualifications, or even their existence.

Consequently, the government has instituted a number of proceedings designed to eliminate unnecessary restrictions upon the advertising of professional and other services. The United States has charged that advertising restrictions imposed by the code of ethics of the American Pharmaceutical As-

[2] *E.g.*, *United States* v. *Prince Georges County Board of Realtors*, Civ. No. 21545, D. Md., terminated by consent decree on December 28, 1970; *United States* v. *American Society of Civil Engineers*, Civ. No. 72 C 1776, S.D. N.Y., terminated by consent decree on June 1, 1972, CCH 1972 Trade Cas. ¶ 73,950; *United States* v. *American Institute of Architects*, Civ. No. 992-72, D.D.C., terminated by consent decree on June 19, 1972, CCH 1972 Trade Cas. ¶ 73,981; *United States* v. *American Institute of Certified Public Accountants, Inc.*, Civ. No. 1091-72, D.D.C., terminated by consent decree on July 6, 1972, CCH 1972 Trade Cas. ¶ 74,007; *United States* v. *National Society of Professional Engineers*, decided in the government's favor November 26, 1975, 404 F. Supp. 457 (D.D.C.) (bar against competitive bidding); *United States* v. *Oregon State Bar*, dismissed as moot, October 20, 1975, 405 F. Supp. 1102 (D. Ore.).

sociation violate the Sherman Act.[3] More recently, the United States filed a Sherman Act complaint against the American Bar Association, challenging the advertising restrictions embodied in its Code of Professional Responsibility.[4] The Federal Trade Commission has instituted inquiries or complaint proceedings concerning advertising restrictions relating to prescription drugs,[5] ophthalmic goods and services,[6] the funeral industry,[7] and medical services.[8]

This case presents the question whether a total ban on lawyers' advertising, promulgated and enforced by the Supreme Court of Arizona, is forbidden by the Sherman Act or the First Amendment.[9] These questions implicate important federal enforcement activities. The claim is often made that anticompetitive practices have been approved or mandated by state officials and are consequently exempt from the Sherman Act. Because the United States has primary responsibility for the enforcement of the Sherman Act, it has an interest in ensuring

[3] *United States* v. *American Pharmaceutical Association*, No. G 75-558-CA5, W.D. Mich., filed November 24, 1975.

[4] *United States* v. *American Bar Association*, No. 76-C-3475, N.D. Ill., filed June 25, 1976.

[5] 40 Fed. Reg. 24031.

[6] 41 Fed. Reg. 2399.

[7] 40 Fed. Reg. 39901.

[8] *American Medical Association*, F.T.C. Docket No. 9064 (December 19, 1975).

[9] The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow* v. *Virginia*, 421 U.S. 809, 811; *Schneider* v. *State*, 308 U.S. 147, 160.

that the state action exemption is not interpreted more broadly than is necessary to protect legitimate decisions, by the States themselves, to substitute regulation for competition.[10] Moreover, if the restrictions challenged here are held not to violate the Sherman Act, the United States has an interest in the resolution of the First Amendment issue both because of its interest in appropriate regulation of deceptive or otherwise harmful advertising and because of the broader interest of ensuring the access of its citizens to the competitively significant nondeceptive information that is essential to the proper functioning of our economy.

STATEMENT

Appellants are members of the State Bar of Arizona. Since 1974 they have been engaged in a form of law practice that they call a "legal clinic." Appellants have endeavored to provide inexpensive legal services to persons of low or moderate income. In order to keep their fees low, they have permitted paralegal personnel to perform work commonly performed by attorneys, they have largely confined their practice to types of cases lending themselves to systematization, and they have accepted a relatively low profit from their services (A. 70-84). Appellants believe that, if their "legal clinic" is to be successful, it must attract large numbers of clients; this cannot be accomplished without widespread dissemination of information about the clinic to potential customers (A. 122-131).

In order to achieve the volume of business that they believe is necessary, appellants placed, in a daily newspaper of general circulation in the Phoenix area, an advertisement notifying the public of the existence of their law office and stating their fees for certain services (A. 409). During the six weeks following the placement of the advertisement, appellants attracted new clients at a rate greater than before (A. 235-236, 479).

The State Bar of Arizona charged appellants with violating Disciplinary Rule 2-101(B), of Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975), which prohibits attorneys from advertising, in any way, in newspapers of general circulation (A. 6-7).[11] Appellants

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[10] Different principles may apply under the Federal Trade Commission Act, and we do not suggest that the decision in this case would necessarily govern Federal Trade Commission proceedings. Cf. *Spiegel, Inc.* v. *Federal Trade Commission*, 540 F.2d 287 (C.A. 7); *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F.2d 741 (C.A. 4); *Chamber of Commerce* v. *Federal Trade Commission*, 13 F.2d 673 (C.A. 8).

[11] Disciplinary Rule 2-101(B) proscribes any "commercial" advertising by attorneys. It provides (emphasis added):

> *A lawyer shall not publicize himself*, or his partner, or associate, or any other lawyer affiliated with him or his firm, *as a lawyer through newspaper or magazine advertisements*, radio or television announcements, display advertising in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by, or whose legal services are

admitted that their advertisement violated the Rule, but they argued that the Rule is invalid under the First Amendment to the United States Constitution and under the state and federal antitrust laws (A. 8-12). Following a hearing, a Special Local Administrative Committee of the State Bar concluded that appellants had violated the Rule. It recommended that both be suspended from the practice of law for not less than six months (A. 481-483).

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furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-102 (A)(6), directed to a member or beneficiary of such organization.

Appellants sought review by the Board of Governors of the State Bar, pursuant to Rule 36 of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (Cum. Supp. 1975) The Board agreed with the Committee that appellants had violated the Rule, but it reduced the recommended penalty to one week's suspension for each appellant (A. 485-487).

The Supreme Court of Arizona affirmed (J.S. App. 1a-17a). The court concluded, without reference to the competitive effects of the Rule, that it does not violate the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, because it does not explicitly fix prices (J.S. App. 4a). It also held that regulation of the bar "is an activity of the State of Arizona acting as sovereign and exempt by the very provisions of the Sherman Act" (*id.* at 5a).

The court concluded, moreover, that state restrictions imposed on advertising by attorneys are immune from scrutiny under the First Amendment. It did not offer any justification for the ban on advertising in the public media; it did not suggest that some less sweeping regulation of advertising would not as well serve the State's purposes. It held, instead, that "[r]estrictions on professional activity, and in particular advertising" (*id.* at 5a), need not be subjected to the scrutiny ordinarily applied to restrictions on speech. It wrote that because "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicita-

tion deemed contrary to the best interests of society" (*id.* at 6a), there was no need for further inquiry.[12]

The court censured appellants but did not suspend them from practice (J.S. App. 11a). One Justice concurred in the result (*id.* at 11a-12a); one Justice dissented, arguing that the penalty selected by the majority is too mild (*id.* at 13a); and one Justice dissented because, in his view, the Rule violates the First Amendment (*id.* at 13a-17a).

SUMMARY OF ARGUMENT

I

The Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Prohibitions upon advertising prevent lawyers from competing in that fashion; they indirectly increase prices and deprive consumers of options. Therefore, even if the special interest in the self-regulation of the legal profession is a sufficient justification for applying a special rule to legitimate restraints that are part of that program of self-regulation, the total ban on advertising still can not survive scrutiny. The serious anticompetitive effects of such a ban outweigh any conceivable benefits.

Although we believe that the ban on attorneys' advertising in the commercial media violates the substantive standards of the antitrust laws, we agree with the Supreme Court of Arizona that it is immune from antitrust challenge under the principles of *Parker* v. *Brown*, 317 U.S. 341, 350-352. *Parker* and the cases that follow it teach that a deliberate decision by the State to substitute some form of regulation for the forces of competition, and the necessary actions of private persons compelled by the State's directive, are beyond the scope of the Sherman Act. We submit that the restraint challenged in this case meets that standard.

The Supreme Court of Arizona promulgated the challenged restraint. It did so with full authority to speak for the State; the Supreme Court of Arizona possesses both the legislative and the judicial powers of Arizona with respect to the legal profession. The rule adopted by Arizona is of statewide applicability and is cast in imperative form: no attorney may advertise in any way in the commercial media. It reflects a deliberate policy of the State to substitute regulation for competition. That is enough, under *Parker*, to show that the Sherman Act does not reach the restriction in question here.

II

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." They were not entitled to defend against the charges by showing that the statements in the advertisement were true and not deceptive. The state court thought that it was enough that appellants had identified

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[12] The court also concluded that the Rule does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment and that it is not unconstitutionally vague (J.S. App. 8a-11a). Appellants have not sought review of these holdings.

themselves to the public as lawyers. We submit that the State's prohibition is unnecessarily broad.

Bigelow v. *Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. Advertisements by attorneys also are speech within the meaning of the First Amendment. The free flow of information about legal services is no less important than the free flow of information about abortion referral services (as in *Bigelow*) or the prices of prescription drugs (as in *Virginia Pharmacy*).

The applicability of the First Amendment to advertisements by lawyers does not mean that a State is powerless to deal with misleading or deceptive advertisements by lawyers. A State may ensure "that the stream of commercial information flows cleanly as well as freely" (*Virginia Pharmacy, supra*, slip op. 24). But Arizona has not advanced any reason to believe that *all* advertisements concerning legal services are deceptive or misleading. A claim that some legal services are "better" than others might be misleading because of the difficulty of comparing the quality of attorneys' performance; no such claim of professional superiority is involved here, however, and the Arizona ban is not so limited. Factual material such as the name, address, and foreign language ability of an attorney is of obvious interest to consumers, yet it is not likely to mislead or deceive. The

other justifications for restrictions upon the advertising of professional services also fall short of supporting a flat ban on advertising in the commercial media. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for its breadth, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

ARGUMENT

I

THE RESTRAINT UPON ATTORNEY ADVERTISING IMPOSED BY THE SUPREME COURT OF ARIZONA IS NOT SUBJECT TO ATTACK UNDER THE SHERMAN ACT

The Supreme Court of Arizona held both (1) that its restrictions upon advertising by attorneys do not violate the Sherman Act because they do not directly fix prices and (2) that any violations are immune from scrutiny because they represent a deliberate state choice to replace competition with regulation. Appellants argue, to the contrary, that the State Bar's conduct is private action violating the Sherman Act. They maintain that the antitrust violation is a defense in the disciplinary proceedings. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173. We submit that the challenged restraint upon advertising violates the substantive standards of the Sherman Act, but that because the restraint is imposed by the State of Arizona it is not subject to the federal statute.

A. The Ban On Public Advertising Violates The Substantive Standards Of The Antitrust Laws

"We live in a society where the distribution of legal assistance * * * is generally regulated by the dynamics of private enterprise." *Fuller* v. *Oregon*, 417 U.S. 40, 53. The provision of legal services is a vast enterprise; in 1973 more than $9.3 billion was paid for those services.[13] The Court thus held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785-788, that, at least in its commercial aspects, the legal profession is subject to the antitrust laws.

The state court's holding that the ban on advertising does not offend the substantive principles of the Sherman Act because it does not directly fix prices is incorrect. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, made it clear that the Sherman Act is designed to prevent restrictions upon competition, not merely the direct fixing of prices. Combinations and conspiracies in restraint of trade can work through clever or indirect devices as well as through direct increases of price or decreases of quantity supplied. Prohibitions upon advertising indirectly increase prices and deprive consumers of options.[14] Any private agreement by competitors to

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[13] Statistical Abstract of the United States 387, 770 (1975).

[14] Steven R. Cox, Associate Professor of Economics at Arizona State University, testified (A. 187-188):

> Q. BY MR. CANBY: Is it fair to conclude from your examination of these studies and from any other experiments that you have done that a ban on price advertising in general marketing tends to drive up prices?
>
> A. You are being very cautious. I can be even stronger. The answer definitely is yes.
>
> * * * *
>
> Yes, price advertising is pro-competitive and will decrease prices, and conversely, a ban on price advertising will be anticompetitive and will increase prices.
>
> There are very few areas where they are going to get that kind of an agreement among economists, but here's one of them.

Professor Cox's conclusions are supported by three recent studies of the effect of prohibitions on price advertising. See Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & Econ. 337 (1972); Cady, *Restricted Advertising and Competition, The Case of Retail Drugs* (Exh. 13). Although comparable studies have not been undertaken for legal services, Professor Cox testified that advertising by lawyers could be expected to lead to a reduction in the price lawyers charge for their services (A. 193). He also testified that advertising would improve the quality of legal services (A. 193-194).

This evidence is consistent with economic theory, which explains that an advertising prohibition increases the cost to consumers of discovering the lowest cost seller of acceptable quality; as a result, sellers obtain greater independence in setting prices and lack incentives to price competitively. Also, advertising prohibitions tend to allow individual prices to diverge more widely than usual from the industry average. Even in the professions, where differences in quality of service naturally account for some dispersion of prices, these differences could not create the pervasive price dispersion now experienced. See Stigler, *The Economics of Information*, in *The Organization of Industry* ch. 16 (1968). When price and

refrain from advertising therefore would be presumed to have serious anticompetitive effects. The

Seventh Circuit therefore has held that agreements among competitors not to compete by price advertising are *per se* violations of the Sherman Act. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688.

Even if the special public interest in the self-regulation of the legal profession were deemed a sufficient justification to apply a special rule to restraints imposed as part of a legitimate program of self-regulation, the Rule at issue here still is unreasonable. The serious anticompetitive effects of such a sweeping ban outweigh any conceivable benefits. After a careful study, two economists concluded that a ban on advertising increased the price of optometric services by 25 to 40 percent. Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421, 446 (1975). It is fair to assume that the restraint challenged here also has a significant effect on the price of legal services. As we discuss at pages 25-37, *infra*, alternatives less restrictive than Arizona's flat ban on advertising are available; these would serve the legal profession's legitimate ethical need to prohibit false or misleading advertising, or advertising that serves to foment litigation or bring the legal profession into disrepute.

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other information is readily available, searching for appropriate low-cost sellers becomes practical for consumers. Sellers in turn are forced to be more competitive with regard to both price and quality. See Telser, *Advertising and the Consumer*, and Nelson, *The Economic Value of Advertising*, in *Advertising and Society* 25-42, 43-66 (Brozen ed. 1974).

This Court has long recognized that even when there is a legitimate right and interest in self-regulation that restrains competition, the restraint must be no more restrictive than is necessary to achieve its proper objectives. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357. The Arizona restriction on attorneys' advertising fails that test, for Rule 2-101(B) denies to consumers almost all information about the costs and availability of legal services.

B. The Arizona Prohibition Against Lawyer Advertising Reflects A Deliberate State Policy

Although we agree with appellants that the ban on advertising offends the substantive principles of the antitrust laws, we agree with the Supreme Court of Arizona that this ban on advertising is immune from antitrust challenge under the principles of *Parker* v. *Brown*, 317 U.S. 341, 350-352.

We take this position with some reluctance. Because private parties often seek shelter from the antitrust laws behind a claim that they have obtained state approval of or acquiescence in their anticompetitive practices, the United States repeatedly has urged that the antitrust immunity accorded to state action be narrowly construed. Thus, in *Goldfarb* v. *Virginia State Bar*, *supra*, the United States expressed its view that the state action exemption should be invoked only where the challenged conduct was "directed, commanded or imposed by the state legisla-

ture or by a duly authorized arm of the state." [15] We contended in *Goldfarb* that the actions of the Virginia State Bar in promulgating and enforcing a minimum fee schedule for attorneys constituted private conduct.

Similarly, in *Cantor* v. *Detroit Edison Co.*, No. 75-122, decided July 6, 1976, the United States took the position that "for private anticompetitive conduct to be state action and therefore immune from the antitrust laws, it must be conduct that the state affirmatively has required as part of a deliberate state regulatory policy or program." [16] We contended there that a public utility's practice of selling light bulbs and electricity in a single package, set forth in a tariff filed with and "approved" by the State public utility commission and that State law required the utility to observe, reflected a policy of the utility, rather than a policy mandated by the State.

It continues to be the position of the United States that the state action exemption to the antitrust laws should not be extended to what are principally private actions, merely because of some approval of or participation by state officials or agents in such conduct. To do so would remove a significant amount of commercial activity from the scope of the antitrust laws without a clear determination by Congress that such anticompetitive conduct is permissible, and without an explicit decision by the State that a de-

[15] Brief for the United States as *Amicus Curiae* 36-37.

[16] Brief for the United States as *Amicus Curiae* 9.

parture from the national policy of competition is in the public interest. On the other hand, *Parker* v. *Brown* and the cases that followed it teach that a deliberate decision by the State to substitute some form of regulation for the forces of free competition, and the necessary actions of private persons compelled by the State's directive, are beyond the scope of the Sherman Act.[17] We submit that the restraint challenged in this case meets that standard.

1. *The Supreme Court of Arizona acts for the State in Promulgating Restrictions Upon Attorneys' Conduct*

Appellants characterize the challenged advertising restriction as predominantly the product of appellee, a largely private group (Br. 60-66). Appellants point to Disciplinary Rule 2-101(B) as the source of the restraints. That Disciplinary Rule, however, has been adopted as part of Rule 29(a) of the Rules of the Supreme Court of Arizona and enforced with full knowledge of its effects upon competition. The Supreme Court of Arizona, not appellee, promulgated the challenged restraint. Unlike the situation in *Goldfarb*, where the Supreme Court of Virginia merely acknowledged the existence of minimum fee

[17] The State may not frustrate federal antitrust policy by allowing (or even compelling) private individuals to enter into restrictive agreements the substance of which is left to private determination. *Parker* v. *Brown, supra,* 317 U.S. at 351; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384. In this case, however, the substance of the restriction is itself a choice of the State.

schedules, here the Supreme Court of Arizona has itself promulgated the prohibition on attorney advertising.

When it promulgated Rule 29(a), the Supreme Court of Arizona acted with full authority to speak for the State.[18] The Court is not faced here (as it was in *Goldfarb*) with action by a private body that is a "state agency" only for limited purposes and is comprised of persons having a direct financial interest in the subject matter of the competitive restraint. The Supreme Court of Arizona, none of whose members may practice law during their term on the court,[19] adopted the restriction on advertising pursuant to authority "vested in it by the Constitution of [Arizona] and its inherent power over members of the legal profession as officers of the Court * * *." Rule 27(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. Ann. (1973). The Supreme Court of Arizona is the ultimate body wielding the State's power over the practice of law; that court may preempt any laws passed by the Arizona legislature concerning the practice of law. See, *e.g.*, *In re Bailey*, 30 Ariz. 407, 248 Pac. 29.

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[18] This Court need not address here the issue whether immunity from the Sherman Act extends to anticompetitive rules promulgated by a state agency that does not have clear authority to do so under either the agency's enabling legislation or its purposes. See, *e.g.*, *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277, 1280 (C.A. 3); *Allegheny Uniforms* v. *Howard Uniform Co.*, 384 F. Supp. 460 (W.D. Pa.).

[19] Ariz. Rev. Stat., Constitution, Article 6, Section 28 (Cum. Supp. 1975).

The Supreme Court of Arizona thus possesses both the legislative and the judicial power of Arizona concerning the practice of law. This Court must defer to Arizona's allocation of legislative powers to its Supreme Court. *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 210. Under these circumstances, a rule promulgated by the Supreme Court of Arizona restricting advertising by attorneys is an official act of the State of Arizona.

2. *The Supreme Court of Arizona's Active Role in Enforcing the Restriction on Lawyers' Advertising Demonstrates that the Restrictions are State Rather than Private Action*

The role of the Supreme Court of Arizona in creating and enforcing the challenged restraint can hardly be described as neutral or incidental to private action. On the contrary, in addition to promulgating the restraint on advertising, the Supreme Court of Arizona has established the procedures by which appellee must assist it in enforcing the restraints, and it has reserved to itself the final enforcement decision. Appellee's role with respect to the challenged restriction is determined by the state court: appellee helps the court to weed out spurious complaints and to establish an evidentiary record. Appellee acts at the compulsion of the Rules of the Supreme Court of Arizona, and that court retains ultimate authority over the entire process.

When a complaint is received indicating that a member of the bar may be guilty of violating Rule 29(a)'s restrictions upon advertising, Rule 33 re-

quires a local committee of appellee to conduct a preliminary investigation. If a complaint appears to be substantial, Rule 35(a) requires the committee to convene a hearing to consider the matter. If the committee determines that discipline is appropriate, Rule 35(c)(3) requires the committee to forward its findings of fact and recommendations to the Board of Governors of the State Bar. If the attorney desires to contest the committee's findings or recommendations, Rule 36 requires the Board to afford the attorney certain hearing rights and to make its recommedation to the Supreme Court within a specified period. Finally, and most importantly, if the attorney desires to contest the Board's recommendations or findings, Rule 37 provides that the Supreme Court of Arizona shall review the matter. That court is the ultimate trier of fact and law. See, *e.g.*, *In the Matter of Wilson*, 106 Ariz. 34, 470 P.2d 441.

Because the Arizona court is directly responsible for both the promulgation of the rule against advertising and its enforcement, the rule represents state action and not private conduct. Unlike *Cantor*, where the restrictive practice did not reflect a considered policy decision by the State, the decision of the Supreme Court of Arizona to prohibit advertising by attorneys is a uniform rule of statewide applicability. Unlike *Goldfarb*, where the Virginia Supreme Court's ethical codes mentioned minimum fee schedules but did not require either state or local bar associations to adopt them, the decision of the Supreme Court of Arizona is that all attorneys

in the State must conform to the prohibition upon advertising.

Whatever may be the case with other restrictive practices, the combination of direct promulgation and enforcement of the rule by the Supreme Court of Arizona, acting in both a legislative and judicial capacity for the State of Arizona, leads inescapably to the conclusion that both the substance and procedure of the Rule are the product of the State and not subject to the Sherman Act.[20]

II

ARIZONA'S TOTAL BAN ON ADVERTISING BY LAWYERS IN THE COMMERCIAL MEDIA VIOLATES THE FIRST AMENDMENT

Appellants have been punished for placing an advertisement in a newspaper, a form of "pure speech." *Buckley* v. *Valeo*, 424 U.S. 1, 16-23; *Bigelow* v. *Virginia*, 421 U.S. 809; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266. They have been punished, moreover, for violating a total ban on such advertisements, a ban that closely resembles a "prior restraint" because it prohibits broadly defined categories of speech without respect to whether the speech is harmful in particular cases. Cf. *Nebraska Press*

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[20] Because the restriction challenged in this case is at the core of the rule of *Parker* v. *Brown*, we express no opinion on the question whether other programs formulated or administered by other bodies must yield, under the Supremacy Clause of the Constitution, to the commands of the Sherman Act. Cf. *Cantor, supra*, slip op. 5-8 (Blackmun, J., concurring).

Association v. *Stuart*, No. 75-817, decided June 30, 1976, slip op. 15-18. Appellants were not entitled to defend the charges brought against them by demonstrating that the statements in the advertisement were true. The state court was not required to find —and did not find—that the advertisement was deceptive, misleading, unfair, undignified, or likely to bring the legal profession into disrepute. It was enough, the court held, that the advertisement identified appellants to the general public as lawyers.

The ban on advertising at issue in this case is exceedingly broad. It sweeps within its prohibition all advertising by attorneys that is likely to call their existence to the attention of the general public. We submit that a ban of this scope violates the First Amendment, although a narrower rule calculated to prevent deceptive or unfair advertising would not. Appellants' censure therefore must be set aside, whether or not the antitrust laws provide them a defense.

A. The First Amendment Protects Advertising By Lawyers In The Commercial Media

Bigelow v. *Virginia*, 421 U.S. 809, and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, hold that commercial advertisements are protected by the First Amendment. These cases make it clear that there is a strong public interest in the free flow of accurate information about commercial services and commercial products, and that

the flow of information cannot be stanched simply because it has a "commercial" subject matter.

Any suggestion that a different rule applies to the professions overlooks the fact that *Bigelow* itself involved an advertisement (not placed by a physician) describing the availability of abortions, a routine medical service. There is no material difference between legal and medical services that would make the First Amendment applicable to advertisements concerning abortions but not to advertisements concerning uncontested divorces.

It is true that the Court observed in *Virginia Pharmacy*, *supra*, slip op. 25 n. 25, that "the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." We do not read this, as the Supreme Court of Arizona did, as implying that the First Amendment does not apply at all to advertising by attorneys. It means only that "certain kinds of advertising" by lawyers and physicians may be deceptive and properly may be prohibited.

Such a prohibition would presuppose the applicability of the First Amendment and would reflect only that the State had overcome the presumptive protection accorded to speech with a demonstration that unrestrained advertising likely would be harm-

ful. The Supreme Court of Arizona did not attempt to demonstrate that the advertisement placed by appellants was deceptive; it relied, instead, on a blanket rule against advertising of all sorts. This rule cannot withstand First Amendment scrutiny.

The Court observed in *Virginia Pharmacy*, *supra*, slip op. 17, that a free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system, [and] it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." This is true about information concerning legal services no less than it is true about information concerning drug prices or the availability of abortions. "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse" (*Goldfarb*, *supra*, 421 U.S. at 788). It is therefore a matter of public interest that consumer decisions about legal services be intelligent and well informed.

Unfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author, reveals the gross ignorance of the public with respect to lawyers and legal services. We have set out at length in Appendix A, *infra*, pp. 1a-9a, some of these findings. One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence. Such a ban, far more extensive than the ban struck down in

Virginia Pharmacy, is fundamentally incompatible with a system of free expression.

B. Arizona's Restrictions Upon Advertising Are Broader Than Is Justified By The Considerations Supporting Some Restrictions Upon Deceptive Advertising

Although the United States believes that Arizona's broad prohibition on attorney advertising violates the First Amendment, we do not imply that the States are powerless to deal with misleading or deceptive advertisements by attorneys. We appreciate the special relationship among the State, the legal profession, and the public that has arisen from the attorney's unique status as an "officer of the court." Moreover, we have no doubt that the bar and the courts must carefully scrutinize the profession and its members to ensure that attorneys do not deceive or mislead the public.

All of this, however, does not support a total ban upon advertising in the commercial media. Many considerations of the public interest might support rules that require communications by attorneys to be scrupulously correct and fair, but none supports a complete prohibition. Many services and products are important to the public health and welfare; most services and products are unique in one way or another; most services and products are provided by groups that have a special concern about those services or products, and that have expertise not shared by the public at large. Yet advertising is allowed with respect to almost all services and products. Any

holding that legal services are in a class apart would rest upon a view of legal services not likely to be shared by those outside the legal profession.

This Court has recognized that there is a "fundamental right within the protection of the First Amendment" to engage in "collective activity undertaken to obtain meaningful access to the courts." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585. See also *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389 U.S. 217; *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1; *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415. That right cannot realistically be used by the people unless they are aware of the availability of legal services and believe that they can afford them. As the studies we discuss in App. A, *infra*, pp. 1a-9a, indicate, however, such information is not now widely available.

The cases cited in the preceding paragraph stand for the rule that there is a collective right of access to the courts that overrides restrictions imposed on the practice of law by state regulatory bodies. The rule should be no different when single practitioners, or partnerships such as appellants, seek to publicize their existence.[21] The right to speak, in this regard,

[21] The First Amendment right of collective action to obtain meaningful access to the courts includes elements of three freedoms: speech, assembly and petition. *United Mine Workers of America, District 12* v. *Illinois State Bar Association, supra,*

is a right of the public to receive valuable information no less than a right of the speaker to transmit it. *Virginia Pharmacy, supra,* slip op. 8-9, 15-22.

The Supreme Court of Arizona did not point to any justification for an absolute prohibition on lawyer advertising in the commercial media. It wrote that "[r]estrictions on professional activity, and in particular advertising, have repeatedly survived constitutional challenge" (J.S. App. 5a-6a), but the cases on which it relied [22] did not consider the First Amendment. Justifications sufficient to survive attack on due process or equal protection grounds will not necessarily survive First Amendment challenge. *Virginia Pharmacy, supra,* slip op. 20-21. The state court also sought comfort in the fact that "[t]he legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interests of society" (J.S. App. 6a). Habit, however, is not an answer to a constitutional argument.

389 U.S. at 221-222. The freedoms of speech and petition do not require joint activity. See Note, *Advertising, Solicitation and the Profession's Duty To Make Legal Counsel Available,* 81 Yale L.J. 1181, 1186 (1972); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services,* 48 N.Y.U.L. Rev. 595, 628-636 (1973).

[22] *Williamson* v. *Lee Optical Co.*, 348 U.S. 483; *Barsky* v. *Board of Regents,* 347 U.S. 442; *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608.

The ban on advertising seems to have originated as a rule of etiquette rather than of ethics. Early English lawyers were wealthy individuals—

> who traditionally looked down on all forms of trade and the competitive spirit characteristic thereof. They regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident. * * *
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> * * * They were a select fraternity who lived together and met one another every day, both at dinner and in court, on a friendly basis. Obviously this intimacy would have been impossible for men who were continually blowing their professional horns and plotting to steal away one another's clients, and hence looked down on by their colleagues.

Drinker, *Legal Ethics* 210 (1953). The codes and canons of ethics have incorporated this position, branding attempts to encroach upon the professional employment of another lawyer as unethical.[23]

The belief that lawyers are "above" competition, however, is nothing more than a prejudice. It reflects a desire for a peaceful, noncompetitive, friendly existence. But it is hardly a satisfactory answer to a First Amendment argument. The notion that the public interest in competition does not apply to legal services was laid to rest in *Goldfarb* v. *Virginia State Bar*, *supra*. A nostalgic attachment to the prohibition

[23] Drinker, *Legal Ethics*, *supra*, at 190-191; Canon 7 of the Canons of Ethics (superseded in 1969 by the Code of Professional Responsibility).

on advertising is not sufficient justification for a restriction which is not required by an articulable public interest.[24]

To the extent that certain kinds of advertising by attorneys may be inherently misleading, the proper remedy would be to ban such advertisements, not to prohibit all advertising in the commercial media.[25] For example, the quality of legal services rendered may be impossible to measure, and this may make a claim by one lawyer that he is "better" than another misleading. There is a ready remedy. Such claims can be prohibited without banning all advertising by attorneys.

Nothing about the practice of law makes *every* advertisement by an attorney deceptive or confusing. Lawyers now may place certain information in law lists, which are available in public libraries. See Dis-

[24] See also Christensen, *Lawyers for People of Moderate Means* 102 (1970).

[25] Misleading, deceptive or unfair advertisements unquestionably may be forbidden. See *Virginia Pharmacy*, *supra*, slip op. 23-25 and n. 24; *Young* v. *American Mini Theatres, Inc.*, No. 75-312, decided June 24, 1976, slip op. 18 and n. 31 (plurality opinion of Stevens, J.). Disciplinary Rule 1-101 (A) (4) (incorporated in Rule 29(a) of the Supreme Court of Arizona) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See also *Health Systems Agency of Northern Virginia* v. *Virginia State Board of Medicine*, N.D. Va., No. 76-37-A, decided November 9, 1976, slip op. 13: "Narrowly tailored statutes, rather than broadside bans on advertising, are sufficient to prevent fraud and deception."

ciplinary Rule 2-102(A)(6) of the Supreme Court of Arizona.[26] If such information is not misleading to the layman when published in law lists, it would not be misleading when printed in a newspaper. Factual material such as name, address, and foreign language ability would be of obvious interest to the consumer, yet it would be unlikely to confuse or mislead.

It is conceivable that advertising of the price of legal services may be misleading, because the amount of work involved varies from case to case. But the Supreme Court of Arizona did not articulate such a rationale, and the Arizona Rule is not so limited. In any event, the argument would be untenable.

It is not misleading to advertise a set fee if the lawyer actually charges it. An attorney may offer certain routine services at a set fee, assuming that some cases will require more time than others but that the average return will be satisfactory. Attorneys agree to precisely such an arrangement when they join the Arizona Legal Services Plan (A. 239-

[26] The American Bar Association adopted amendments to that rule in 1976. The amendments expand the range of information that may be placed in law lists to include: "whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services * * *." The same information may also be placed in a directory published by a state, county, or local bar association and the classified section of the telephone directory. The Supreme Court of Arizona has not yet adopted these amendments.

241, 459-478). A similar system governs many prepaid legal service plans.[27] Many other professions do the same, with full knowledge that some jobs are more difficult and time consuming than others.

If an attorney conducts part of his practice on a flat fee basis, it is not misleading to publish that information in the newspaper. What is more, not all price advertising necessarily involves a set fee for a single service. The price of an initial half-hour consultation, for example, would be of interest to consumers. So would be the attorney's hourly rate. There is no reason to believe that such information is usually deceptive.

Some testimony in the record displayed a concern that an attorney who advertises fees would cut quality or engage in deceptive "add-on" tactics when confronted with a more complex case (A. 155, 378-381). Expert testimony in the record indicates, however, that advertising would not detrimentally affect the quality of legal services.[28] Indeed, this Court noted in *Virginia Pharmacy, supra*, slip op. 21, that an "advertising ban does not directly affect professional standards one way or the other." A professional inclined to cut corners will do so without regard to the existence of a ban upon advertising; such a ban merely tends to insulate him from competition.

[27] Cf. Meeks, *Antitrust Aspects of Prepaid Legal Services Plans*, 1976 A.B.F. Res. J. 855; Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411.

[28] See the testimony of Professor Cox (A. 210).

Other professional sanctions are available to ensure quality. *Id.* at 21-22. The legal profession is closely regulated, and independent disciplinary rules prohibit an attorney from providing service of inadequate quality and from engaging in deceptive practices.[29] There is simply no evidence—and the Supreme Court of Arizona cited none—to indicate that the unscrupulous attorney is deterred from cutting corners by the advertising prohibition, or that the conscientious attorney would ignore the dictates of the Code of Professional Responsibility if he were permitted to advertise.

Concern has been expressed that laymen would blindly follow the lowest advertised price without considering the quality of legal service offered. Even if this were a proper consideration, it would not support a ban on all advertising. And it is not a proper consideration. This Court rejected precisely that argument in *Virginia Pharmacy*, slip op. 21-22, as inconsistent with the philosophy of the First Amendment. The Arizona ban on attorney advertising in

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[29] Disciplinary Rule 6-101(A)(2) prohibits an attorney from handling a matter without adequate preparation, and Disciplinary Rule 6-101(A)(3) prohibits neglect of a matter entrusted to an attorney. The Supreme Court of Arizona has adopted those rules. The Supreme Court of Arizona has not adopted Disciplinary Rule 6-101(A)(1) of the Code of Professional Responsibility, which prohibits an attorney from handling a matter he knows he is not competent to handle without associating competent counsel. Disciplinary Rule 1-102(A), which has been adopted by the Arizona Court, prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation.

the commercial media does not ensure that individuals will choose the most competent attorney; it merely deprives most consumers of the information on which to base their choice.

The United States recognizes that many attorneys are concerned that advertising will seriously erode the dignity or public esteem of the legal profession. The effectiveness of the legal profession stems, at least in part, from public respect. We doubt that a concern about "dignity"—a concern held in common with other professions—is an adequate justification for a total ban on advertising. But however that may be, the Supreme Court of Arizona did not find that advertising would impair public respect for the legal profession.

Engineers advertise, as do bankers and investment counselors; these professions are not regarded by the public as undignified. Clients might generally be expected to value respectability and dignity in a lawyer, so that few lawyers would engage in undignified advertising. Public cynicism concerning lawyers who publicly eschew solicitation—while structuring their social, civic, and even religious associations to provide contacts with clients—may be a much greater threat to public regard for the profession than a frank admission that lawyers are interested in attracting clients.[30] Thus, as the British

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[30] See Thurman, Phillips and Cheatham, *Cases on the Legal Profession* 122-123 (1970); Note, *Advertising, Solicitation and Legal Ethics*, 7 Vand. L. Rev. 677, 679 (1954).

Monopolies and Mergers Commission reported to Parliament:[31]

> [T]he public are well aware that solicitors are in practice for the purpose, among others, of earning a living. We do not think they will be surprised or shocked if members of the profession invite custom explicitly and informatively.

There has also been concern that advertising by attorneys may stir up unwarranted litigation. See, *e.g.*, Drinker, *Legal Ethics*, *supra*, at 212. That view cannot be reconciled with the modern acceptance of the courts as a forum for vindicating individual rights. See *N.A.A.C.P.* v. *Button*, *supra*.[32] There is no justification for discouraging litigation of all sorts in order to deter unwarranted litigation. The encouragement of frivolous, harassing, malicious, or unwarranted litigation is independently prohibited by Disciplinary Rule 7-102(A). The ban on advertising inhibits the assertion of legal rights by the segment of society least familiar with its rights; it

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[31] Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* 40 (1976).

[32] See also Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958); Comment, *The Bar As a Trade Association: Economics, Ethics, and the First Amendment*, 5 Harv. Civ. Rts.—Civ. Lib. L. Rev. 334 (1970); Christensen, *Lawyers for People of Moderate Means*, *supra*.

does not discourage litigation generally or ensure that litigation will be meritorious.[33]

The United States therefore submits that none of the justifications for a sweeping ban on advertising by attorneys in the commercial media is sufficient to overcome the First Amendment rights of willing speakers and willing listeners. Appellants were penalized for violating such a broad ban, for the very act of notifying the public of their existence. Because of the breadth of the Arizona ban, and because the Arizona court did not articulate any reasons for the ban, this case does not require the Court to decide whether some more specific prohibition would be constitutional.

We believe, however, that more specific and less restrictive means can be devised to address legitimate public concerns. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has proposed a revision of Canon Two that would permit advertising unless the material contains a "false, fraudulent, misleading, deceptive or unfair statement or claim."[34] The Board of Gov-

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[33] In any case, the broad Arizona restraint cannot be justified by concern about unwarranted litigation, because it applies equally to the advertisement of services not directly related to litigation, such as changes of name and the drafting of wills.

[34] The proposed disciplinary rule would define ten categories of prohibited statements. See *Discussion Draft: Proposed Amendments to Ethical Considerations and Disciplinary Rules*

ernors of the District of Columbia Bar has petitioned the District of Columbia Court of Appeals to modify Canon Two, and Disciplinary Rules 2-101 through 2-105, to permit advertising.[35] The Board of Governors of the California State Bar has proposed a rule that would expand the information permitted to be contained in law lists, and would permit the publication of identical material in the commercial media.[36] The British Monopolies and Mergers Commission has recommended that solicitors be allowed to advertise by any method, provided only that:[37]

(1) No advertisement, circular or other form of publicity used by a solicitor should claim for his practice superiority in any respect over any or all other solicitors' practices.

(2) Such publicity should not contain any inaccuracies or misleading statements.

(3) While advertisements, circulars and other publicity or methods of soliciting may make clear the intention of the solicitor to seek custom, they should not be of a character

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of Canon 2 of the Code of Professional Responsibility (December 6, 1975) (reproduced as Appendix C, *infra*, pp. 62a-94a).

[35] See Petition of the Board of Governors of the District of Columbia Bar For Amendments to Rule X of the Rules Governing the Bar of the District of Columbia, filed in the District of Columbia Court of Appeals, November 10, 1976 (reproduced as Appendix B, *infra*, pp. 10a-61a).

[36] See Appendix D, *infra*, pp. 95a-130a.

[37] Monopolies and Mergers Commission, *supra*. See Appellants' Br. App. 9a-10a.

that could reasonably be regarded as likely to bring the profession into disrepute.

The United States does not necessarily endorse any of these proposals. They demonstrate, however, that the legitimate concerns of the public and the profession can be vindicated by rules less restrictive than Arizona's total ban on advertising by attorneys. Arizona has not attempted to tailor its rules to any specific legitimate concern. The absolute ban Arizona has imposed on advertising by lawyers in the commercial media is not responsive to any legitimate justification for restrictions on attorney advertising, and it cannot stand.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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APPENDIX A

THE INADEQUATE DISTRIBUTION OF LEGAL SERVICES IN THE UNITED STATES

Legal services are not equitably distributed. The American Bar Association has stated that "the middle 70% of our population is not being reached or served adequately by the legal profession." [1] Professor Cheatham has explained:[2]

> As the proportion of the poor has gone down, the proportion of the middle classes has gone up, so that an increasing proportion of our people

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[1] American Bar Association, *Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services* 2 (1972). See also the statement of Orville H. Schell, Jr., President of the Association of the Bar of the City of New York, during the Hearings on "The Organized Bar: Self-Serving or Serving the Public," before the Subcommittee on the Representation of Citizens Interests of the Senate Judiciary Committee, 93d Cong., 2d Sess. (1974), reprinted in Curran and Spalding, *infra*, at 11:

> [A] high percentage of people in this country are not receiving adequate legal services. The estimated percentages run from 60-90% of the population. Whatever estimate you take the numbers are staggering.

See generally Christensen, *Lawyers for People of Moderate Means* (1970); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Court and Lawyering Services*, 48 N.Y.U. L. Rev. 595 (1973); Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092 (1971).

[2] Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 Colum. L. Rev. 973, 973-974 (1963).

are able to pay for the legal services they need. Further, the increase in wealth brings an increase in the legal problems of acquiring and disposing of property, and thus the need for legal services goes up faster than the proportion of the middle classes.

Yet these growing classes with an increasing need for legal services do not obtain in proportionate measure the legal services they need, at least from lawyers. The wide gap between the need and its satisfaction by the bar has been indicated by numerous studies beginning in the 1930's. * * *

* * * The middle classes lack the sentimental appeal of the poor, and they are unprofitable clients for the most successful members of the profession. Neither sentiment nor interest has led the profession to give to this largest part of our people the attention they merit.

A recent study commissioned by the American Bar Association's Special Committee to Survey Legal Needs indicates that more than 30 percent of the population has never consulted a lawyer, and almost another 30 percent has consulted a lawyer only once.[3]

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[3] Curran and Spalding, *The Legal Need of the Public* 79-81 (1974) (Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association, in collaboration with the American Bar Foundation). The survey showed that 67 percent of the population has consulted a lawyer, of which 28.9 percent of the population has consulted a lawyer only once. See also Missouri Bar-Prentice Hall Survey, *A Motivational Study of Public Attitudes and Law Office Management* (1963), in Murphy and Walkowski, *Compilation of Reference Materials on Prepaid Legal Services* 4 (American Bar Association 1973),

A study of working class Americans indicated that only 54 percent had ever consulted a lawyer, and that more than half of those individuals had done so only once.[4]

Individuals unfamiliar with legal services often do not realize that the services of a lawyer would be desirable.[5] For example, only 68 percent of the

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which concludes that only 64 percent of their sample had ever consulted a lawyer; Industrial Social Welfare Center of the Columbia University School of Social Work, *Legal Need of Clerical Workers Members of the New York District of American Federation of State, County and Municipal Employees* (1972), summarized in Murphy and Walkowski, *supra*, concludes that only 69 percent of the respondents had ever consulted a lawyer.

[4] Marks, Hallauer and Clifton, *The Shreveport Plan: An Experiment in the Delivery of Legal Services* 33 (1974) (study of the members of a construction union). See also Marks, *The Legal Needs of the Poor: A Critical Analysis* 8 n. 10 (American Bar Foundation 1971); Pfennigstorf and Kimball, *Legal Service Plans: A Typology*, 1976 A.B.F. Res. J. 411 (collecting sources); Getman, *A Criticism of the Report on the Shreveport Experiment*, 3 J. Legal Studies 487 (1974). Professor Getman suggests that the study of the Shreveport Plan was improperly executed, but he does not call into question the gist of the argument in this appendix.

[5] See Koos, *The Family and the Law: Report of a Study of Family Needs as Related to Legal Services* (1952), summarized in Murphy and Walkowski, *supra*, at 7 (although 41.6 percent of the middle class families surveyed had experienced a "legal" problem in the preceding year, only 80 percent of the families with a problem recognized the need for legal assistance, and only 60 percent obtained legal counsel. Among working class families, 35.6 percent had experienced a prob-

union members questioned in one study realized that a lawyer could be of any assistance if an individual were threatened with eviction by his landlord in retaliation for complaints about defective wiring.[6]

Even individuals who realize that the services of a lawyer would be of assistance frequently do not obtain counsel. The American Bar Association's recent study indicated that 19 percent of the respondents had not obtained counsel in situations where they felt a need for it.[7] Of 1,040 New York City clerical workers responding to another survey, 564 reported unfulfilled needs for legal services. The same survey showed that the number of occasions on which legal representation had been obtained was approximately equal to the number of occasions on which the workers did not obtain such services, despite recognizing the need.[8] Similarly, the Shreveport study of construction workers indicated the following high percentages of

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lem, but only 44.2 percent of those families obtained counsel). See also American Bar Association, *Revised Handbook on Prepaid Legal Services, supra,* at 2:

> The public fears the cost of legal services. They are frequently not aware of what problems are "legal" and what lawyers can do to solve such problems. They seldom avail themselves of the counselling skills of the lawyer to plan for the future or to prevent future difficulty. Their contact with a lawyer occurs only when a crisis situation demands it.

[6] Marks, Hallauer and Clifton, *supra,* at 49.

[7] Curran and Spalding, *supra,* at 85.

[8] Industrial Social Welfare Center, *Legal Needs of Clerical Workers Members, supra.*

union members who did *not* consult an attorney with respect to matters generally recognized as requiring the services of a lawyer: drawing of will, 92 percent; representation in connection with an arrest, 86 percent; experienced racial discrimination in obtaining employment or housing, 100 percent; purchasing a house or land, 69 percent.[9]

There are several reasons why individuals fail to obtain counsel even when they recognize a need for it. Foremost among those are the high cost (or fear of the cost)[10] of legal services and inability to locate a lawyer willing and competent to deal with the problem.[11]

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[9] Marks, Hallauer and Clifton, *supra,* at 35.

[10] See *Report of the Special Committee on the Availability of Legal Services,* adopted by the House of Delegates of the American Bar Association (February 1968), noted in American Bar Association, *Revised Handbook on Prepaid Legal Services, supra,* at 26:

> We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wide utilization of legal services.

See also Industrial Social Welfare Center, *Legal Need of Clerical Workers Members, supra,* at 2 (514 of 1,040 respondents said that expected costs are a reason for not using a lawyer's services); Koos, *supra,* at 11.

[11] See Curran and Spalding, *supra,* at 95. Among the respondents to that survey, 48.3 percent strongly agreed, and another 30.9 percent slightly agreed, with the statement that people do not go to lawyers because they have no way to learn the names of lawyers competent to handle the problem. See also Christensen, *Lawyers for People of Moderate Means, supra,* ch. IV.

The individual's fear of the cost is often exaggerated. A study of middle class individuals revealed that they overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice about a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.[12]

At least part of the failure of people to realize their own needs for legal services results from a lack of communication by the bar. The same can be said of decisions not to seek legal services that are based upon mistaken notions about the cost or availability of such services. Not surprisingly, therefore, most scholars on the subject agree that advertising would be of significant value in improving the delivery of legal services to those most in need. See, *e.g.*, Christensen, *Lawyers for People of Moderate Means* 137-138 (1970):

> Such an increase in information would almost surely help people to recognize their legal problems, to see their need for lawyers' help, and to get in touch with the right lawyers more readily than at present * * * . The end result should

[12] See the study by James G. Frierson, described in the Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (App. B, *infra*, pp. 24a-25a). The Shreveport study similarly demonstrated that 62 percent of the respondents estimated that an initial half-hour consultation would cost more than $10, although half of the lawyers in Shreveport reported that they did not charge for such a consultation if no further work was involved. Marks, Hallauer and Clifton, *supra*, at 50.

> be increased public utilization of lawyers, with people of moderate means obtaining much legal help they would not otherwise get. This is clearly the most important value that may be served by allowing lawyers greater freedom to advertise and solicit legal business.

Similarly, the Monopolies and Mergers Commission recently presented a report to the British Parliament recommending that British solicitors be permitted to advertise.[13] The Commission concluded that the public was in need of additional information concerning legal services, that advertising may increase public trust and confidence in the profession, and that the current prohibition on advertising deprives the public of legal services and reduces the stimulus to efficient delivery of those services. Monopolies and Mergers Commission, *Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising* (1976).[14]

Economic theory and empirical evidence support the conclusion that dissemination of price information would help to lower the cost of legal services through

[13] See also Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181 (1972).

[14] In a companion study concerning barristers, the Commission concluded that no changes were necessary, primarily because barristers are not hired directly by laymen. Monopolies and Mergers Commission, *Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising* 22-24 (1976).

competition.[15] Comparison shopping for legal services is difficult, and more difficult for some than others.[16] Unless an attorney is willing to quote a price on the telephone,[17] the client must go to an unfamiliar office and discuss his problem with the attorney in person before discovering the approximate cost of the service. He must face the potential embarrassment of having to admit, after consultation, that he cannot afford the fee. The cost of gathering fee information is especially high if a working person must visit an attorney during working hours. These impediments make effective price comparisons impractical.

The ban on advertising in the commercial media also inhibits the development of new forms of legal practice designed to improve the delivery of legal services. Appellants' legal clinic is an example of such an experiment. Such clinics are valuable to the middle class, for they offer a limited range of routine services at a reasonable cost by relying on the

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[15] See note 14, *supra*, in the text of the brief.

[16] The record includes testimony from a representative of a senior citizens' group indicating that its members are particularly concerned with obtaining advance knowledge of the cost of legal services. See testimony of James L. Jones, a Director of the Phoenix Chapter of the American Association of Retired Persons (A. 133-144). Mr. Jones testified that appellants' advertisement would be of assistance to members of the group in obtaining legal services because it discusses cost.

[17] If an attorney is willing (and allowed) to quote a price over the telephone, there is no sound reason why he should not be allowed to advertise that price.

use of paraprofessionals and specialization.[18] Appellants testified that a "legal clinic," which requires a large volume, cannot succeed without advertising.[19] Even if legal clinics, or other experimental forms of practice, could exist without advertising, the Arizona rule would inhibit those in need of such services from learning of them.

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[18] See Interview with Thomas Ehrlich, then Dean of Stanford Law School, *Complaints About Lawyers, Are They Justified*, U.S. News and World Rep. 49 (July 21, 1975); Brickman, *Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism*, 71 Colum. L. Rev. 1153 (1971); Note, *supra*, 81 Yale L.J. at 1206; Christensen, *supra*, at 45, 81; Johnstone and Hopson, *Lawyers and Their Work* 543-545 (1967); Hearings before the Subcommittee on the Representation of Citizen Interests of the Senate Judiciary Committee, *supra*, at 43 (statement of Stuart Kadison, Chairman of the ABA Special Committee on the Delivery of Legal Services), *id.* at 85 (statement of Orville Schell, President of the Association of the Bar of the City of New York), *id.* at 88 (statement of Thomas Ehrlich).

[19] See A. 129. Dean Ehrlich agrees that advertising is necessary for the development of legal clinics. See Interview, *Complaints About the Legal Profession, supra*, at 49.

APPENDIX B

IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION OF THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR FOR AMENDMENTS TO RULE X OF THE RULES GOVERNING THE BAR OF THE DISTRICT OF COLUMBIA

The Board of Governors of the District of Columbia Bar respectfully petitions this Court, pursuant to Rule XIII, Section 1 of the District of Columbia Court of Appeals Rules governing the Bar of the District of Columbia, to amend the American Bar Association's Code of Professional Responsibility as amended by this Court, and incorporated in Rule X of the Rules of the District of Columbia Court of Appeals governing the Bar of the District of Columbia. The proposed amendments are set out in Exhibit A hereto.

The amendments proposed by the Board of Governors are explained in the report of the Legal Ethics Committee on proposed amendments to the Code of Professional Responsibility dealing with advertising and solictation by lawyers. The full report and recommendations of the Legal Ethics Committee were adopted with the exception of ethical consideration EC 2-9 at its regular meeting on Tuesday, November 9, 1976. A copy of that report, together with the dissent of one member of that committee, is attached hereto as Exhibit B.

As Exhibit C, the Board of Governors also submits a copy of the monograph prepared under the direction of Lewis A. Rivlin, entitled "The Future of the Regulation of the Legal Profession: Antitrust Jurisdiction in the District of Columbia after *Goldfarb*".

WHEREFORE, the Board of Governors respectfully requests this Court grant the petition and amend the Rules as set forth herein in Exhibit A.

Respectfully submitted,

/s/ CHARLES R. WORK
Charles R. Work, President

Dated: November 10, 1976

PROPOSED AMENDMENTS

Note: Boldface indicates proposed additions; (*Parenthesis and Italics indicates proposed deletions.*)

ETHICAL CONSIDERATIONS

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of *(acceptable)* **competent** legal counsel **whose fees they can afford.** Hence, important functions of the legal profession are to educate *(laymen)* **members of the public** to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

RECOGNITION OF LEGAL PROBLEMS

EC 2-2. The legal profession should assist *(layman)* **members of the public** to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers *(acting under proper auspices)* should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. *(Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of*

permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.)

EC 2-3. Whether a lawyer acts properly in volunteering advice to a *(layman)* **member of the public** to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist *(laymen)* **members of the public** in recognizing legal problems. The advice is proper *(only if)* **whenever it is** motivated **in whole or in part** by a desire to protect one who does not recognize that he **or she** may have legal problems or who is ignorant of his **or her** legal rights or obligations. *(Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.)*

EC 2-4. *(Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept em-*

ployment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.) **The purpose of encouraging lawyers to volunteer advice to members of the public is to fulfill the duty to make legal counsel available by informing members of the public of their legal rights and of the availability of effective legal assistance. Accordingly, lawyers should scrupulously avoid making any false or misleading statements to members of the public regarding their rights or regarding the ability of lawyers in general or of particular lawyers to provide effective assistance.**

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for *(laymen)* **members of the public** should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

SELECTION OF A LAWYER: GENERALLY

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom **he or she** had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable *(laymen)* **members of the public** to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many *(laymen)* **members of the public** have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. **In addition, many people feel uncertain about whether lawyers are interested in helping them, and about the possible expense of preliminary interviews, and they are therefore reluctant to approach lawyers to seek legal counsel.**

EC 2-8. *(Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best*

served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.) **Because of changed conditions, lack of knowledge about the availability of lawyers, and the reluctance of many people to seek needed legal assistance, people are, as a practical matter, being denied effective legal assistance. In order to inform people of the availability of counsel, increase the likelihood of intelligent selection of attorneys by members of the public, and eliminate misunderstanding about fees, lawyers should freely provide information about their availability to accept particular kinds of cases, their experience in handling such cases, and their fees.**

SELECTION OF A LAWYER: PROFESSIONAL NOTICES AND LISTINGS

(EC 2-9 The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of profes-

sional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.)

EC 2-10. *(Methods of advertising that are subject to the objections stated above should be and are prohibited. However,)* The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer *(while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.)* **and such additional information that is accurate and that might assist a potential client in making an informed choice of an attorney. Care should be taken, however, to avoid creating unrealistic expectations in particular cases. In addition, lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice.**

EC 2-11. The name under which a lawyer conducts his **or her** practice may be a factor in the selection process. The use of a trade name or an assumed name **should be avoided if it** could mislead *(laymen)* **members of the public** concerning the identity, responsibility, and status of those practicing

thereunder. *(Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.)* For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his **or her** name to remain in the name of the firm if he **or she** actively continues to practice law as a member thereof. Otherwise, *(his)* **the lawyer's** name should be removed from the firm name, and he **or she** should not be identified as a past **or present** member of the firm; and *(he)* **the lawyer** should not *(hold himself)* **be held** out as being a practicing lawyer.

EC 2-13. In order to avoid the possibility of misleading persons with whom he **or she** deals, a lawyer should be scrupulous in the representation of his **or**

her professional status. *(He)* **A lawyer** should not hold himself **or herself** out as being a partner or associate of a law firm if he **or she** only shares offices with another lawyer.

(EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having special training or ability, other than in historically excepted fields of admiralty, trademark, and patent law.)

(EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.)

DISCIPLINARY RULES

(Present Disciplinary Rules DR 2-101 thru DR 2-105 are deleted **and rewritten as follows.)**

DR 2-101. **A lawyer shall not knowingly make any representation about his or her ability, background, or experience, or that of the lawyer's partner or associate, that is false or misleading, and that might reasonably be expected to induce reliance by a member of the public.**

DR 2-102. **A lawyer shall not knowingly give a client or potential client a false or misleading impression of the state of the law, such as by overstating the likelihood that a particular outcome will result from litigation, or by stating what is merely the lawyer's opinion about the law as if it were a conclusively established rule of law.**

DR 2-103. **A lawyer shall not solicit or advertise to potential clients in any way that would violate a valid law or regulation, or a contractual or other legal obligation of the person through whom the lawyer seeks to communicate.**

DR 2-104. **A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communications from the lawyer.**

DR 2-105. **A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners. A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.***

RATIONALE OF THE AMENDMENTS

Rules of legal ethics are, broadly speaking, of two kinds. Rules of the first kind relate to the integrity of the system of administering justice and are designed to insure that the system will function effectively and fairly. Those rules include such matters as full access to the legal system, the competence and independence of counsel, preservation of clients' confidences, and zealous representation within the bounds of law. Rules of the second kind are those that are concerned less with the integrity of the system and more with the conduct of lawyers as members of a guild or trade association. Such rules, which are principally anticompetitive, include maintenance of minimum fees and restrictions on advertising and solicitation.

Canon 2 of the Code of Professional Responsibility contains both provisions that relate to the integrity of the system and provisions that relate to restrictions on competition. The guild or anticompetitive

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*** Proposed DR 2-105 is derived substantially from the present 2-102(C) and (D).**

provisions of Canon 2 may have perverted the more fundamental provisions of that Canon, which are concerned with the integrity of the system.

The "axiomatic norm" [1] that serves as the headnote to Canon 2 is: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." The Ethical Considerations and the footnotes to Canon 2 explain the crucial relationship of that Canon to the integrity of the administration of justice. Members of society "have need for more than a system of law; they have need for a system of law which functions, and that means they have need for lawyers." [2] However, legal problems "may not be self-revealing and often are not timely noticed." [3] The need of members of the public for legal services is met, therefore, "only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel." [4] Quoting Justice Lewis F. Powell, Jr. (then President of the American Bar Association), the Code notes that, when people are denied their day in court because ignorance has prevented them from obtaining counsel, there is a denial of the fundamental right to equal

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[1] See Code of Professional Responsibility, Preliminary Statement.

[2] Cheatham, "The Lawyer's Role and Surroundings," 25 Rocky Mt. L. Rev. 405 (1953), quoted in Canon 2, n. 1.

[3] EC 2-2.

[4] EC 2-1.

justice under law.[5] Thus, a "basic tenet" of the professional responsibility of lawyers is that "every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." [6]

The scope of our failure to achieve equal justice under law, in the rudimentary sense of providing access to legal services, is illustrated by the estimate of a Special Committee of the American Bar Association that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people.[7] Other responsible authorities suggest that the correct figure is substantially higher.[8] Moreover, as recognized in the Code of Professional Responsibility, a principal cause of the under-use of available legal services is ignorance on the part of members of the public regarding the need, availability, and cost of legal services.[9] Furthermore, the Code also recognizes that institutional advertising has been employed for decades,[10] but such efforts obviously have proved inadequate to cope with the problem.

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[5] Canon 2, n. 3.

[6] EC 1-1.

[7] ABA Special Committee on Prepaid Legal Services, a Primer of Prepaid Legal Services (1974).

[8] Tunney and Frank, "Federal Roles in Lawyer Reform," 27 Stan. L. Rev. 333, 343 & n. 36 (1975).

[9] See EC 2-1, 2-2, 2-6, 2-7, and footnotes 1 through 7, and 17.

[10] Canon 2, n. 4-7.

A dramatic illustration of the relationship between under-use of legal services and ignorance on the part of members of the public is provided in a study undertaken by James G. Frierson, who is both an attorney and an associate professor of business administration at East Tennessee State University. Professor Frierson first determined what the charge would be in Johnson City, Tennessee, to have a lawyer draw a simple will for a husband, or read and give advice on a two-page consumer installment contract, or discuss a potential legal problem and give some general advice without any research, spending about 30 minutes with the client. He then determined what middle class people in the same city expected to have to pay for those services. Frierson discovered that middle class consumers overestimated lawyers' fees by 91 percent for the drawing of a simple will, 340 percent for reading and giving advice on a two-page installment sales contract, and 123 percent for 30 minutes of consultation and general advice.[11]

Professor Frierson also found that 75 percent of his sample had not seen a lawyer on any personal matter within the previous five years, that 75 percent had no will, although a substantial number were married with children, and that 75 percent had signed an installment sales contract in the previous

[11] Affidavit of James G. Frierson in Consumers Union of the United States, Inc. v. American Bar Association, No. 0105-R (E.D. Va. 1975).

five years.[12] On the basis of his survey Frierson concluded that average middle class consumers do not use the services of a lawyer "primarily because of their grossly inflated expectations of lawyers' charges." [13]

Frierson's study, of course, serves only to confirm what has been known by the profession and recognized in the Code of Professional Responsibility. As we have seen, the axiomatic norm that stands as a headnote to Canon 2 that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." The difficulty arises from the fact that the first five Disciplinary Rules under Canon 2 are devoted not to ensuring adequate information about the availability and cost of legal services but, rather, to restricting the communication of relevant information by proscribing advertising and solicitation by lawyers. Thus, DR 2-101 forbids a lawyer to use any means of commercial publicity, DR 2-102 imposes narrow limitations on the use of such things as professional cards, letterheads, and telephone directory listings, DR 2-103 forbids a lawyer to recommend that a non-lawyer retain the lawyer's services if the non-lawyer has not initiated the contact by seeking legal advice, DR 2-104 says that a lawyer who has given unsolicited legal advice to a member of the public shall not accept employment resulting from that advice, and DR 2-105 for-

[12] Ibid.

[13] Barrister Magazine, vol. 2, n. 1, pp. 6, 8 (Winter, 1975).

bids a lawyer to indicate that he or she specializes in a particular area of the law.[14]

Those are the provisions, of course, that have effectively blocked any real efforts to provide relevant and necessary information to members of the public, and have thereby made a mockery of the overriding professional obligation to provide access to the legal system. It is becoming increasingly recognized, however, that the prohibitions against advertising and solicitation are not only unwise as a matter of public policy but also of dubious validity under both the antitrust laws and the Constitution.

In the antitrust area, the Supreme Court recently decided in *Goldfarb* v. *Virginia State Bar*[15] that the publication and enforcement by bar associations of minimum fee schedules violate the Sherman Act. The principal issue in *Goldfarb* was whether the practice of law, as a "learned profession," is outside the scope of the Sherman Act, which is concerned with "trade or commerce." The Supreme Court held that the sale of a service for money is "commerce" and went on to observe that, "It is no disparagement of the practice of law as a profession to acknowledge that it has

[14] In each of those instances, arbitrary exceptions are provided, e.g., self-laudatory advertising can be purchased in a number of publications approved by the American Bar Association, a lawyer may solicit employment among friends, relatives, and former clients, and specialists in patent, trademarks, and admiralty law may so designate themselves.

[15] 421 U.S. 773 (1975).

this business aspect. . . ." [16] The Court also noted that, "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitve activities by lawyers may exert a restraint on commerce." [17]

The *Goldfarb* opinion was written by the Chief Justice and there was, remarkably, not a single dissent. (Mr. Justice Powell, who had been president of the Virginia State Bar, did not participate.) In addition, the Antitrust Division of the Department of Justice has adopted the position that a proscription of advertising and solicitation also violates the Sherman Act.[18]

Antitrust policies are not, however, the most appropriate concerns in assessing advertising and solicitation by attorneys. As indicated at the outset, the Ethical Considerations dealing with access to the legal system are rooted in the fundamental right of equal justice under law. In addition, the right of lawyers to communicate with potential clients, and the rights of members of the public to be informed by those communications, are protected by a variety of constitutional rights, including freedom of speech, the right to petition for redress of grievances, freedom of association, and the right to due process of law. Indeed, the Supreme Court has already held

[16] *Id.* at 787.

[17] *Id.* at 788.

[18] See "Law Firm Advertising," 44 U.S.L.W. 2008 (July 1, 1975).

in a series of cases of major importance that rules of professional ethics, including those relating to advertising and solicitation, must give way to constitutional rights.

The first case in that series was *NAACP* v. *Button*,[19] which considered solicitation of clients in the context of efforts of the NAACP to recruit plaintiffs for school desegregation cases. The NAACP called a series of meetings, inviting not only its members, and not only poor people, but all members of the community. At those meetings, the organization's paid staff attorneys took the platform to urge those present to authorize the lawyers to sue in their behalf.[20] The NAACP maintained the ensuing litigation by defraying all expenses, regardless of the financial means of a particular plaintiff.

Virginia contended that the NAACP's activities constituted improper solicitation under a state statute and fell within the traditional state power to regulate professional conduct. The Supreme Court held, however, that "the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment . . . upon protected freedoms of expres-

[19] 371 U.S. 415 (1963).

[20] The Court has recognized the critical importance of solicitation to effective litigation in noting that proscription of solicitation in *Button* would have "seriously crippled" the efforts of the NAACP. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967).

sion." [21] The Court concluded: "Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." [22]

Subsequently, in *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*,[23] the Supreme Court considered the question of solicitation in a case in which a union's legal services plan resulted in channeling all or substantially all of the railroad workers' personal injury claims, on a private fee basis, to lawyers selected by the union and touted in its literature and at meetings. The Court again upheld the solicitation on constitutional grounds, despite the objection of the two dissenting justices that by giving constitutional protection to the solicitation of personal injury claims, the Court "relegates the practice of law to the level of a commercial enterprise," "degrades the profession" and "contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." [24]

In *United Mine Workers* v. *Illinois Bar Ass'n*, the Supreme Court dealt with the argument that *Button*

[21] NAACP v. Button, *supra* note 19 at 438.

[22] *Id.* at 438-39.

[23] 377 U.S. 1 (1964).

[24] *Id.* at 19 (dissent of Mr. Justice Clark).

should be limited to litigation involving major political issues and not be extended to personal injury cases. The Court held: "The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones are guarded. . . .'" [25] Finally, in the *United Transportation Union* case, the Court reversed a state injunction designed, in Mr. Justice Harlan's words, "to fend against 'ambulance chasing.'" [26] In that case a union paid investigators to keep track of accidents, to visit injured members, taking contingent fee contracts with them, and to urge the members to engage named private attorneys who were selected by the union and who had agreed to charge a fee set by prior agreement with the union. The investigators were also paid by the union for any time and expenses incurred in transporting potential clients to the designated lawyers' offices to enter retainer agreements.

In approving that arrangement, the Court reiterated that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." [27] What is important to bear in mind, however, is that: (1) the attorneys in question were not in-house counsel for the union but private practitioners; (2) the attorneys earned substantial fees; (3) the cases were not "public interest" cases in the restricted sense but were ordinary personal injury cases; and (4) the attorneys were retained as a result of the activities of "investigators," paid by the union, whose job it was to find out where accidents had occurred, to visit the victims as promptly as possible, to "tout" the particular lawyers and, if necessary, to take the victim to the lawyers' office to get a contingent fee contract signed.[28]

[25] 389 U.S. 217, 223 (1967).

[26] United Transp. Union v. State Bar, 401 U.S. 576, 597 (1971) (dissent of Mr. Justice Harlan).

[27] *Id.* at 585.

It might be suggested that the three union cases involved group legal services, with the solicitation restricted to members of the union. Although there are references in those cases to rights of association, other language in the opinions is much broader. The Court noted in *United Mine Workers* that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." [29] Similarly, the First Amendment does not pro-

[28] The only question not decided by the Court was whether the investigators could properly have been paid directly by the lawyers. The dissenting Justices would have disapproved such a practice, while the majority simply did not reach the issue, on the ground that it was not in the record before them. It is difficult, however, to see why a significant distinction should turn on who pays the investigator. An unsophisticated person needs information about the availability of legal services, regardless of whether he or she is a member of a union and regardless of who pays the informant.

[29] United Mine Workers v. Illinois Bar Ass'n, *supra* note 25 at 223 n. 25.

tect speech and assembly only in the context of unions or other membership associations. Further, the solicitation in the *Button* case was not limited to members of the NAACP.

On the same day that *Goldfarb* was decided, the Supreme Court handed down an opinion in *Bigelow* v. *Virginia*,[30] a case that has not attracted as much attention as *Goldfarb* in connection with advertising and solicitation by lawyers but that is of far greater significance. In *Bigelow*, the defendant was convicted of violating a provision of the Virginia anti-abortion statute by publishing an advertisement offering to make low-cost arrangements for legal abortions in New York. The importance of the *Bigelow* case to the issue of advertising by lawyers is emphasized by the similarity between arguments typically made in support of the anti-advertising provisions of the Code and the arguments made by the Virginia Supreme Court in affirming Bigelow's conviction. That court held that the advertisement "clearly exceeded in informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact."[31] In rejecting Bigelow's First Amendment claim, the Virginia court said that a "commercial advertisement" "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field," *i.e.*, a professional area in

[30] 421 U.S. 809 (1975).

[31] See *id.* at 814.

which the state's regulatory power presumably would be at its maximum. In addition, the court noted that the purpose of the statute was to insure that pregnant women in Virginia, making decisions with respect to abortions, did so "without the commercial advertising pressure usually incidental to the sale of a box of soap powder."[32] Those of course, are precisely the kinds of arguments that are made in support of regulations against advertising by lawyers.

Significantly, in striking down the Virginia statute on First Amendment grounds, the Supreme Court relied on *NAACP* v. *Button* for the proposition that a state cannot foreclose the exercise of constitutional rights simply by labeling the speech "solicitation" or "commercial advertising."[33] In the course of reaching that conclusion, the Court severely restricted, if it did not overrule, *Valentine* v. *Chrestensen*,[34] which had suggested that commercial advertising was not fully protected by the First Amendment.[35]

Finally, the Court made a strong bridge between the protected advertising in *Bigelow* and advertising by lawyers, by stressing the fact that the *Bigelow* advertisement contained information about legal issues:

> "Viewed in its entirety, the advertisement conveyed information of potential interest and value

[32] *Ibid.*

[33] See especially *id.* at 826.

[34] 316 U.S. 52 (1942).

[35] 421 U.S. at 819-21 and especially n. 6.

> to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Also, the activity advertised pertained to constitutional interests. . . . Thus, in this case, appellant's First Amendment interests coincide with the constitutional interests of the general public." [36]

Thus, the *Bigelow* advertisement was given First Amendment protection expressly because it was directed to a "diverse audience" (not just the membership of an association), conveying information to those with a "general curiosity about, or genuine interest in . . . the law . . . and its development. . . ." Presumably, that same language would be descriptive of any advertisements offering legal services. Moreover, the reference in the *Bigelow* advertisement to the fact that abortions are legal in New York was made only in passing. Certainly the communication of legal information ("Abortions are legal in New York") was quite limited, and there was no explicit suggestion of the desirability of law reform. In the same sense, therefore, any advertisement relating to the availability of legal services would convey information of "potential interest and value" to people having a "general curiosity" about the law, its development, or law reform.

[36] *Id.* at 822.

It seems abundantly clear, therefore, that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid. Accordingly, it is appropriate, if not urgent, that we undertake the task of redrafting Canon 2.

In an earlier effort to that end, a draft of proposed amendments was circulated to the members of the Legal Ethics Committee of the District of Columbia Bar (as well as to the Subcommittee on Professional Responsibility of the Society of American Law Teachers).[37]

One concern expressed in response to that draft is that advertising by lawyers may prove to be "undignified" in some instances. The concern is a legitimate one. The appearance of justice, though not as important as the substance of it, is a matter of legitimate concern. If lawyers conduct themselves in an undignified way, the law itself may, to that extent, lose the appearance of dignity. On the other hand, a disciplinary standard that would require dignity and yet withstand constitutional attack may be impossible to achieve. In reversing a conviction in a rather extreme case of undignified expression ("Fuck the Draft"), Mr. Justice Harlan observed

[37] The author of that draft and principal author of the current proposal and of this statement is Monroe H. Freedman, Dean of the Hofstra Law School and Chairman of the Legal Ethics Committee and of the SALT Subcommittee on Professional Responsibility. The text of the draft appears in the New York Law Journal, p. 1, May 28, 1975.

that "One man's vulgarity is another's lyric." [38] "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," [39] and standards like "undignified" or "in good taste" clearly cannot meet that test.

Although it would not be feasible to draft a Disciplinary Rule forbidding lawyers to be undignified, the structure of the Code does permit the expression of aspirational guides in the Ethical Considerations. Accordingly, the draft proposed here does urge in the Ethical Considerations that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice."

Since the earlier proposed redraft of Canon 2 would have imposed no prohibition on advertising and solicitation other than to forbid false and misleading representations, comments also expressed concern with a variety of offensive kinds of conduct that might result. For example, police officers might hand out lawyers' cards at the scenes of accidents.[40] Accident victims, strapped into stretchers, might be importuned by hospital orderlies to retain particular lawyers. Lawyers or their representatives might in-

[38] Cohen v. California, 403 U.S. 15 (1971).

[39] NAACP v. Button, *supra* note 19 and 438.

[40] Interestingly, one member of the Subcommittee on Professional Responsibility, objecting to individual advertising, suggested as a desirable alternative that police officers might be required to distribute institutional advertising about legal services at accident scenes.

terrupt funeral services to solicit probate work. People might be solicited through unwanted telephone calls or visits at home. And so on.

Those concerns also are legitimate, and an effort should be made to deal with them. However, that effort should not consist of prohibitions on communications by rules that are broader than necessary to serve the legitimate governmental purpose. As the Supreme Court observed in *Shelton* v. *Tucker*:[41]

> "In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Certainly it is not necessary to impose a broad ban on advertising and solicitation by lawyers in order to deal with such cases as the hospital orderly or the police officer. For example, if it is inappropriate for an orderly to solicit legal business (or, indeed, to speak to a patient at all, other than as required by the performance of hospital duties) hospitals can, and presumably do, issue appropriate directives to their employees. It would seem entirely appropriate, therefore, to discipline a lawyer who knowingly induced a breach of such an obligation by an orderly or by a police officer or any other employee. Simi-

[41] 364 U.S. 479, 488 (1960).

larly, a lawyer could be disciplined for soliciting business in a cemetery or any place else where business activity may be generally forbidden.

The appropriate approach to dealing with such cases, as well as with those cases involving harassing telephone calls or unwelcome visits to homes, is suggested in four Supreme Court decisions involving closely analogous situations. The first case is *Martin* v. *Struthers*.[42] There the Court invalidated a city ordinance that made it unlawful for any person distributing handbills, circulars or other advertising matter to ring a door bell or otherwise summon a householder to the door. The Court recognized a legitimate governmental interest in such a prohibition since "burglars frequently pose as canvassors, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." [43] The Court held, however, that the right of fredom of speech and press embraces not only the right to distribute literature, but also necessarily protects the right to receive it.[44] Moreover, the city could have used a less drastic means to achieve its end, and one that would not have impinged upon those First Amendment rights:

[42] 319 U.S. 141 (1943).

[43] *Id.* at 144.

[44] *Id.* at 143.

> "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive these strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." [45]

That is, the ordinance "substitute(d) by judgment of the community for the judgment of the individual householder," subjecting the distributor to criminal punishment for annoying another person "even though the recipient of the literature . . . is in fact glad to receive it." [46] The Court noted, however, that its holding did not prevent the city from punishing those who call at a home "in definance of the previously expressed will of the occupant." [47] Supreme Court in *Breard* v. *Alexandria*,[48] a decision written by Mr. Justice Reed, who had dissented in *Martin*. In *Breard* the ordinance restricting door-to-door solicitation was directed against those who failed to obtain the prior consent of the owners of the residences solicited. Thus the legislative standard in *Breard* did not meet the test established in *Martin*, because the Court in *Martin* would have required an "explicit command from the owners to stay away." [49] How-

[45] *Id.* at 147.

[46] *Id.* at 144.

[47] *Id.* at 148.

[48] 341 U.S. 622 (1951).

[49] 319 U.S. at 148.

Martin v. Struthers appeared to be severely limited in the subsequent decision of the

ever, in dealing with the First Amendment aspect of the case, Justice Reed distinguished *Martin* v. *Struthers* expressly on the ground that that case had involved the distribution of leaflets advertising a religious meeting, whereas the defendant in *Breard* had been selling magazines. The selling, Justice Reed said, "brings into the transaction a commercial feature." [50] Emphasizing that point, he noted that the Court in *Martin* had directed attention to the fact that the ordinance there had not been aimed "solely at commercial advertising." [51] Thus, insofar as *Breard* appeared to represent a retreat from the Court's position in *Martin* v. *Struthers*, it was based expressly upon the notion that "commercial speech" is not entitled to full constitutional protection. As indicated in the discussion above, that idea has recently been decisively rejected by the Supreme Court in *Bigelow* v. *Virginia*.[52]

Even before the rejection of *Valentine* v. *Chrestensen* in *Bigelow*, a standard similar to that approved in *Breard* was unanimously struck down by the Court. The case of *Lamont* v. *Postmaster General* [53] involved a federal statute that permitted the Post Office to hold "communist political propaganda" arriving from abroad, unless the addressee requested delivery. The Supreme Court invalidated that statute

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[50] 341 U.S. at 642.

[51] *Ibid.*

[52] See *supra* at pp. 14-17.

[53] 381 U.S. 301 (1965).

on the ground that it abridged the addressees' First Amendment rights by burdening the exercise of those rights with an affirmative obligation on the part of the addressee. By contrast, in *Rowan* v. *Post Office* [54] the Supreme Court upheld a statute that did not interpose the Postmaster General between the sender and the addressee but, rather, established a procedure whereby the householder could reject certain mailings in advance. Chief Justice Burger, writing for a unanimous Court, quoted with approval from *Martin* v. *Struthers* in holding that the freedom to distribute information to every citizen can only be limited if the power to prevent a distributor from calling at the home is left with the [sic].

~~*Martin* v. *Struthers* appeared to be severely limited in the subsequent decision of the~~ individual homeowner. On that authority, the statute in *Rowan* was upheld because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." [55] Thus, in *Lamont* and *Rowan*, *Breard* was ignored and the rule of *Martin* v. *Struthers* was applied.

The proposed amendments to Canon 2 take their cue from those decisions. A community, or professional, judgment is not substituted for that of the individual citizen as to whether solicitation is de-

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[54] 397 U.S. 728 (1970).

[55] *Id.* at 737.

sirable. Rather, a lawyer would be subject to professional discipline for soliciting a potential client only after that person has given the lawyer notice that he or she does not want to receive communications from the lawyer.

In sum, then, the proposed redraft of Canon 2 would (a) eliminate the general proscription against advertising and solicitation, but would (b) urge lawyers to advertise in a dignified manner, (c) forbid lawyers to solicit in ways that would violate valid laws or regulations, or that would involve the breach of a contractual or other legal obligation of the person through whom the lawyer seeks to communicate (e.g., a hospital attendant or police officer), and (d) further forbid lawyers to solicit anyone who has made it clear that he or she would prefer to be left alone. That approach, it is submitted, is pursuant to the need to ensure access to legal services by providing adequate information to the public and is consistent with the requirements of the First Amendment.

DISSENT TO REPORT AND RECOMMENDATIONS

BY S. WHITE RHYNE, JR.

The Legal Ethics Committee has proposed a drastic revision of the rules of conduct under Canon 2 of the Code of Professional Responsibility. Just how drastic the revision really is can be seen from the following hypothetical examples of lawyer conduct, all of which would be permissible without disciplinary action under the proposed new rules:

Lawyer A employs an agent to cruise the city in a car equipped with a police radio. The agent drives to the scene of automobile accidents and attempts to persuade accident victims or their families to retain Lawyer A. The agent is instructed by Lawyer A to try to get signatures on retainer contracts at the scene.

Lawyer B employs an agent to call on the families of decedents whose names appear in newspaper obituaries or are supplied by morticians to whom the lawyer pays a commission. The agent carries retainer contracts for estate work.

Lawyer C has an office with his name and the words "Attorney at Law" in the front window in two-foot-high flashing neon letters. On top of the building is a billboard with a picture of the blindfolded goddess "Justice," holding scales in one hand a large illuminated dollar sign in the other. Beneath the picture is the legend, "Lawyer C for Big Judgments." On weekends, C's employees walk the streets,

handing out balloons and bumper stickers with the same legend, and an airplane writes it in the sky. Lawyer C later begins practicing under the trade name, "Big Judgments, P.C."

The **Law Firm of D and E** advertises: "You saw your doctor and you still hurt? See us and perhaps we can help relieve the pain. Our prescriptions can restore your wealth if not your health." On radio and television, the same message is preceded by a dulcet voice crooning "Zap your M.D., hire D and E."

The **Law Firm of F, G and H** promotes itself with the motto, "Prestige for Particular People," Its advertisements, mostly on the financial pages of local newspapers and in programmes at the Kennedy Center, depict the distinguished-looking senior partner in a vested suit sitting in his walnut pannelled, handsomely appointed office, chatting with various smiling clients. Several volumes of the Supreme Court Reports are always at his elbow.

These examples are cited only as possibilities. The manner and style of individual efforts at advertising and solicitation could be as diverse as the 20,000 members of the D.C. Bar. The point is not what most will do but what some may do. Because the Code prescribes what is permissible, a judgment as to whether or not a change in the Code would serve the public interest cannot be made without a full awareness of the extreme range of what the change would permit.

I share the concern of the majority of the Committee with opening up the channels of communication so that the public will have what the Committee report describes as "adequate information about the availability and cost of legal services." I don't think that removing the proscriptions on advertising and solicitation by lawyers is a desirable, appropriate or even a particularly effective way of achieving that objective. It should be noted, for instance, that not one of the examples of permissible lawyer conduct set out above involves the communication of any information to the public which is necessary or relevant to the selection of a lawyer.

Principal Reasons for Opposition

There are four principal reasons, all grounded in the public interest, why I am opposed to removing the proscriptions on lawyer advertising and solicitation. Two are mainly philosophical and two are practical. I shall state the philosophical reasons first because they seem to me to go to the heart of how one views the role of a lawyer, both in relationship to clients and as a participant in the process of administering justice.

First, advertising and solicitation seem to me to be basically inconsistent with professionalism. Professionals hold themselves out as willing to serve. When they step from that passive posture into a role of actively trying to attract business for profit, they appear to be and are self-seeking. Client confidence in their professionalism is eroded, and the

manner in which they perceive their own role may also be affected.

Granted, there are business aspects to the practice of law as there are professional aspects to the rendition of services by many businessmen. Lawyers who do not follow good business practices may not be practicing their profession for very long. Nevertheless, the practice of law should still be regarded primarily as a service to people and not as a business for profit. There are countless instances where considerations of personal profit run counter to considerations of client welfare, and where the client must depend on the lawyer's professionalism in putting the client's interests first. Clients, and lawyers too, must always know that this type of selfless professionalism is what is expected of lawyers. Introduction of commercial marketing practices common to the business world will tend to obscure the very real distinction between the practice of law as a profession and the carrying on of business.

Some say the present provisions of the Code on advertising and solicitation merely cause lawyers to be devious rather than direct in promoting themselves with prospective clients. Certainly there are instances now of client solicitation by lawyers, from courtroom hallways to country club greens. However, that is no reason to abandon provisions of the Code which are honored by most reputable lawyers. The Code should proclaim standards of good professional conduct, not those of the lowest common denominator.

A second fundamental reason why I oppose removing the proscriptions on advertising and solicitation is that it will open the door to practices which are undignified. I refer here to dignity in the process of administration of justice and not to dignity of lawyers as a group. The selection of a lawyer is an essential step in the process of the administration of justice. For some people, it is the most important step. It should not take place in an aura of "hucksterism" such as surrounds the marketing of soap powder. The right to counsel does not commence in the courtroom, and neither should basic decorum of counsel in fulfilling their vital role in the administration of justice.

The Committee's proposal recognizes the desirability of maintaining dignity by providing in an "ethical consideration" (as opposed to a "disciplinary rule") that "lawyers should strive to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice." However, the proposal recognizes that this admonition is an "aspirational guide" only. It would not be subject to enforcement in a disciplinary proceeding, no matter how flagrantly or frequently it might by violated.

The third reason I oppose advertising and solicitation by lawyers is that they encourage people to select lawyers for the wrong reasons—reasons not related to the competence and integrity of the lawyer being selected. For instance, advertising may encourage people to select lawyers because of "name-

recognition," or "image." Both can be created by advertising, as every political candidate knows. Image and name-recognition—not the dissemination of information—often seems to be the primary functions of commercial as well as political advertising. See, e.g., ads for Marlboro cigarettes (image) and the "Goodyear Blimp" (name-recognition).

Solicitation may encourage people to select lawyers on the basis of who gets there first, or who makes the most attractive sales pitch. The Committee majority, in citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), argues that antitrust considerations support removal of the Code proscriptions on advertising and solicitation. *Goldfarb*, of course, dealt with price-fixing and not with advertising or solicitation. Moreover, dropping the bars on client solicitation is not necessarily pro-competitive. Where practices of client-solicitation permit an aggressive lawyer to lock up an unsophisticated client with an early retainer contract, those practices are actually anti-competitive. Such a client is foreclosed from price-shopping or any other investigation of possible alternatives to the services of the lawyer who made the "early bag."

Even price-shopping is not the best way of selecting a lawyer, though I believe clients should be provided with the information necessary to do that if they wish; and, at certain economic levels, it may be essential to obtaining needed legal services. However, the best way of selecting a lawyer is and always has been on recommendations from satisfied clients, attorneys and others with knowledge of the lawyer's competence and integrity.

Whether this process operates in a corporate board room or in a neighborhood civic association or storefront chuch, it remains the way that most clients are most likely to find lawyers who will serve them well. Commercial advertising and solicitation may distort that process by encouraging the selection of lawyers for other reasons, and by making it possible for lawyers who are not competent and do not enjoy a good reputation nonetheless to subsist through the type of "one-time client" that advertising and solicitation can provide.

Fourth, I oppose removing the proscription on solicitation because it may result in harassment of members of the public. The Committee recognized that possibility and inserted in an earlier draft of the proposed new disciplinary rules the language which now appears in proposed DR 2-104: "A lawyer shall not solicit a potential client who has given the lawyer adequate notice that he or she does not want to receive communcations from the lawyer."

However, that does not solve the problem. It merely tells the lawyer not to be persistent. Any lawyer is entitled to one try, even if it happens to be the tenth approach by a lawyer that day. The proposed rule does not even protect the public against the single solicitation which is so out-of-taste as to be annoying by its very nature, such as an approach to the bereaved at a funeral home.

In summary, therefore, I oppose removing the proscriptions on lawyer advertising and solictation because such activities are inconsistent with professionalism, because they demean the process of administration of justice, because they encourage members of the public to select lawyers for the wrong reasons and because, in the case of solicitation, they may result in harassment of members of the public. I think these public interest detriments would be offset by few if any public interest benefits. There is some prior experience to support this view.

THE PATENT LAW EXPERIENCE

At the public hearing conducted by the Legal Ethics Committee, a statement opposing the proposed changes was made by a representative of the Steering Committee of Division XIV (Patent, Trademark and Copyright) of the D.C. Bar. That statement brought to the attention of the Ethics Committee the fact that advertising by patent practioners had been permitted by the Commissioner of Patents until 1959. The experience was so unsatisfactory that, after extensive hearings and briefs and arguments by interested parties, the Patent Office adopted a rule which is currently in effect barring "the use of advertising, circulars, letters, cards and similar material to solicit patent business, directly or indirectly."

The patent experience was that only 2% of 6,700 practitioners chose to advertise. Statements by three

former Commissioners of Patents at the public hearings leading to the 1959 rule revision indicated that the services rendered by the advertisers were of poorer quality and more expensive than those rendered by other practitioners, and more frequently occasioned client complaints. Tr. 188, 191, 196, 197, attached as Exhibit 3 to Division XIV statement. I believe we should profit from the patent law experience, and not regress to a system that has been proved in practice to be contrary to the public interest.

ANTITRUST CONSIDERATIONS

Prominent in the majority report of the Ethics Committee are references to the recent Supreme Court decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The *Goldfarb* case, dealing with applicability of the Sherman Antitrust Act, is simply inapplicable to the Code of Professional Responsibility as it regulates the practice of law in the District of Columbia. The Court recognized in its opinion that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." 421 U.S. at 788. See also *Parker* v. *Brown*, 317 U.S. 341 (1943).

The Code of Professional Responsibility is promulgated in this jurisdiction by the D.C. Court of Appeals, exercising delegated legislative power. See 11 D.C. Code § 2501 and Rule X of the Court. That is

clearly state action. The proscriptions under Canon 2 will not change until the D.C. Court of Appeals adopts the change. The Court will undoubtedly consider thoughtfully any recommendations for change from the D.C. Bars, as it should. However, the final decision will be made by the Court.

The Legal Ethics Committee received a statement at its public hearing from the Steering Committee of Division II (Antitrust, Trade Regulation and Consumer Affairs) of the Bar. The representative of that Division, while supporting generally the Committee proposal, acknowledged that "court regulation in the District would overcome the Federal antitrust laws." Tr. 55.

In the follow-up letter, the Division II Steering Committee appeared to advocate retention of something like the provision in present DR 2-103(B) which says that, except for payments of fees to bar-sponsored lawyer referral services, "a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client." That provision, along with most of the rest of the disciplinary rules under Canon 2, is eliminated in the Committee's proposed revision. The Committee proposal speaks to the matter of paying for recommendations only in instances where the activity violates a contractual or other legal obligation of the person hired as a solicitor—for instance, where the "capper" is a police officer or hospital attendant.

The Division II follow-up letter said that payments to cappers could be prohibited, consistent with the policies of the antitrust laws, "because they involve a payment which ultimately would be passed on to the public." Apparently advocating such a prohibition, the letter went on to say: "Foreclosing these practices would not appear to restrict competition between lawyers, but it would have the beneficial effect of insuring that the public not indirectly subsidize activities which cannot add to the value of legal services being offered." I don't see a difference between payments for solicitation and payments for advertising insofar as the likelihood of a cost-pass-through to consumers is concerned. Both kinds of payments have the potential for making the public subsidize activities which do not add to the value of legal services.

CONSTITUTIONAL CONSIDERATIONS

The other recent Supreme Court case cited in the majority report, *Bigelow* v. *Virginia*, applied constitutional protection of free speech to commercial advertising. The case did not involve advertising or solicitation by lawyers. It did recognize that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." 421 U.S. at 826.

The Committee majority seems to find, in four earlier cases involving solicitation of clients for lawyers, an indication that the Court would—if faced with the question—rule that restrictions on lawyer

advertising and solicitation are unconstitutional. See *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967); and *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576 (1971).

That may or may not be true. I hope the Supreme Court is ultimately presented with the question and decides it, but I do not believe it has done so yet.

Three of the four cases cited by the majority (*i.e.*, all but the *NAACP* case) involved solicitation directed by organizations at their own members, as part of a group legal services plan. In none of those cases did lawyers themselves take part in the solicitation nor did lawyers make any payment to the solicitors.

In the only case which involved participation by lawyers themselves in activities of solicitation or which involved solicitation outside the membership of the sponsoring organization, the services were rendered free to the clients. *NAACP* v. *Button*, 371 U.S. at 420, 440 n.19. Moreover, that case involved a state antisolicitation statute specifically tailored by amendment to curb civil rights litigation and found by the Court to have the potential for "smothering" such exercise of lawful activity on behalf of an "unpopular minority." *Id.* at 423-25, 434-36. No such reprehensible purpose or application lies behind the Code of Professional Responsibility as adopted in the District of Columbia.

The Supreme Court case which comes closest to deciding the question of the constitutionality of bans on lawyer advertising is *Semler* v. *Oregon State Board*, 294 U.S. 608 (1935). There the Court upheld the constitutionality of a state statute which made dentists subject to revocation of license for "advertising professional superiority or the performance of professional services in a superior manner."

Granted the case is forty years old, it was cited without disapproval in both *Goldfarb* and *Bigelow*. 421 U.S. at 792 and 825. The Court in the latter case said specifically that it was not deciding "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate," and that its decision was "in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity." 421 U.S. at 825. *Semler* was cited as one of the cases upholding state regulation of professional activity.

While free speech policy considerations advanced by the Supreme Court in the cases cited by the Committee are relevant to what it has proposed, and no restriction on speech is ever to be taken lightly, the majority vastly overstates its case in asserting that it is "abundantly clear . . . that the present provisions of the Code of Professional Responsibility, forbidding advertising and solicitation by lawyers, are constitutionally invalid." The determination by the Bar (and ultimately by the Court of Appeals) of what is in the public interest as to lawyer advertising and

solicitation has not been foreclosed by constitutional decisions of the Supreme Court. Rather, such a determination has been mandated by the Supreme Court, which called in *Bigelow* for a "balancing" of competing interests—"assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* at 826.

On one free speech point, I am in total agreement with the majority. I do not believe that regulation of lawyer advertising or solicitation based on a standard of what is "dignified" or "in good taste" would be either practical or constitutional. If the door once opended, we shall have to take the bad with the good. In that regard, it should be noted that a number of witnesses at the public hearing who supported removing the ban on lawyer advertising and solicitation joined their support with simplistic statements to the effect that of course such activities should not be conducted in such a manner as to be undignified or irritating to the public. It is just not that simple.

THE BASIC PROBLEM

The Legal Ethics Committee is correct in its recognition that there are major problems in the District of Columbia, as elsewhere in the nation, in making possible the delivery of affordable legal services to persons of moderate income and modest assets. People have legal problems, as they have medical problems, which quickly outrun their ability to pay.

I don't agree with the Committee majority in its conclusion based on a study in Johnson City, Tennessee, that most people have an exaggerated idea of lawyers' charges. I believe that legal services, like medical services, are expensive and people know it. That is particularly true in an area like the District of Columbia where the overhead costs associated with practicing law are high.

The majority is correct in stating that the "axiomatic norm" of Canon 2 is that the legal profession has a duty to try to do something about this. While it is doubtful that the problem can be solved in the long run without public funds, that does not relieve the bar of its responsibility. Part of the reason for the recent movement for removing the proscriptions on advertising and solicitation by lawyers is that the the legal profession has not done all it should do in carrying out its duty under Canon 2. Individual lawyers have not done all they should do in meeting the personal ethical obligation placed on each of them by Canon 2—To "Assist the Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available."

This is changing, however. Bar-sponsored or bar-endorsed group legal services plans and legal clinics are appearing. Prepaid legal insurance plans are developing. The bar is actively involved in experiments with certification of specialists, one result of which may be the lowering of costs of services by channeling similar legal problems to those most qualified to handle them efficiently. There is increased in-

terest across the country in making lawyer referral services more responsive to the needs of moderate income clients. These developments in the 1970's, aimed at serving middle and moderate income Americans, have followed equally commendable developments in the 1960's aimed primarily at serving indigents.

Nonetheless, it has remained impossible for lawyers to engage in any meaningful price competition, or for clients to enjoy the benefits of that type of competition, because the bar has not opened up the channels of communcation between lawyers and clients as to fees. In some instances, through mandatory minimum fee schedules now ruled illegal, the bar has actively opposed price competition. That has foreclosed lawyers who have been able to achieve economies of operation, or who are willing and able to work for less remuneration themselves, from reaching their natural market—the consumer who must have a cheaper price in order to be able to afford a lawyer. This has happened at the same time that we have more young lawyers entering the profession than ever before, many of them unable to practice their chosen profession because of absence of employment opportunities.

ALTERNATIVE APPROACHES TO THE PROBLEM

Two current developments in the District of Columbia suggest ways of communicating information to the public about the availability and cost of legal

services without the evils arising from commercial advertising. First, the Lawyer Referral Services Committee of the D.C. Bar has recently proposed to the Board of Governors that the Bar initiate a "Lawyer Register." Lawyers participating in the service could list information relevant to clients in selecting an attorney, including fee information if they so chose, on a registration sheet which would be made available to members of the public at the Bar Offices and perhaps at other locations. The various registration sheets would be cumulated and cross-indexed in such categories as areas of concentration of practices, geographic location of office, and language fluencies. The service would be free to lawyers and members of the public. The instructions to the public on how to use the service would encourage contacts with other clients or attorneys for references before entering into a retainer agreement.

The Committee has proposed that the availability of the new service be vigorously promoted by the Bar through institutional advertising. Such advertising could and should include information to the public on how to recognize the need for professional legal help and when to seek a lawyer.

A second encouraging development is a recommendation to the Board of Governors by the Committee on Specialization that the Bar publish a "Lawyer Directory." Information about lawyers choosing to be listed would be published in the directory, including fee information. The charge to participating attorneys would be $10 per listing, and the directory

would be sold at a nominal cost to members of the public.

In the case of both the Lawyer Register and the Lawyer Directory, the dissemination of information would be subject to the supervision of the appropriate Bar committee. The Legal Ethics Committee has already ruled that the Lawyer Register, operated by the Bar as a lawyer referral service, would comply with existing provisions of the Code of Professional Responsibility. If the Lawyer Directory does not also comply, any change in the Code necessary to permit its publication would be slight.

Reference should be made to the reports of those two committees for the details of their proposals. Neither of these proposed new services of the Bar is subject to the objections applicable to unrestricted lawyer advertising and solicitation. Both of them would achieve what commercial advertising and solicitation would not, maximum dissemination of information useful to a prospective consumer of legal services in the selection of a lawyer, at little or no cost to the lawyer wishing to disseminate that information. They would provide consumers of legal services with a device for comparing information as to all attorneys who wish to be considered in the comparison process, not just those attorneys who can afford to advertise and whose sales pitch happens to reach the client when the need for legal services is there.

The proposal of the Legal Ethics Committee as to advertising and solicitation, and the proposals of

these other two committees of the Bar for a Lawyer Register and a published Lawyer Directory, are not mutually exclusive. The Board of Governors may choose to endorse them all. However, I suggest the other two proposals as a more acceptable and effective way of addressing the concerns which prompted the report and recommendations of the Ethics Committee. At the very least, I would not venture into unrestricted commercialism without first seeing whether adequate information about the availability and cost of legal services cannot be communicated to the public by more moderate means.

APPENDIX C

DISCUSSION DRAFT

Proposed Amendments to Ethical Considerations and Disciplinary Rules of Canon 2 of the Code of Professional Responsibility

Prepared by the
American Bar Association
Standing Committee on
Ethics and Professional Responsibility

December 6, 1975

Background

The Canons of Professional Ethics were first adopted by the American Bar Association in 1908. They were amended from time to time thereafter by the Association. On August 14, 1964, Lewis F. Powell, Jr., then President of the American Bar Association (now Associate Justice of the Supreme Court of the United States) created a Special Committee on Evaluation of Ethical Standards. The work of this Committee resulted in the development of the Code of Professional Responsibility which was adopted by the House of Delegates on August 12, 1969. Since that time the Code has been amended by the House of Delegates in 1970, 1974, and 1975.

The Standing Committee on Ethics and Professional Responsibility has held two open meetings to discuss the present limitations on advertising. The

first open meeting of the Committee was held on October 3, 1975 in Washington, D.C. for the purpose of hearing comments from predominantly non-lawyer national organizations. The second open meeting was held November 1, 1975 in Chicago, Illinois for the purpose of hearing comments from the bench and bar. All Section and Committee chairmen of the American Bar Association were invited as were the presidents of all Bar Associations represented in the House of Delegates of the American Bar Association.

The amendments prepared for discussion are the outgrowth of study by the Committee and discussion within the profession of the ethical issues bearing on communications to the public about the availability of lawyers' services. The amendments reflect comments submitted to the Committee at hearings by lawyers, lawyers' organizations, legal service organizations and consumer organizations. In preparing the Discussion Draft, the Committee carefully considered the recent decisions of the Supreme Court in the *Bigelow* and *Goldfarb* cases.

Comments on Discussion Draft

Canon 2 reads as follows:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

Historically, the profession has believed that advertising by lawyers was neither required nor appropriate to fulfill its responsibilities under this

Canon. However, in the context of contemporary society, particularly with respect to its metropolitan characteristics in a service-oriented economy, the continued validity of these beliefs has been questioned by some. The draft amendment would permit advertising by lawyers, unless the material contains "a false, fraudulent, misleading, deceptive or unfair statement or claim." The draft Disciplinary Rules define such a statement as one which:

"(1) contains a misrepresentation of fact;
"(2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
"(3) contains a client's laudatory statements about a lawyer;
"(4) is intended or is likely to create false or unjustified expectations of favorable results;
"(5) implies unusual legal ability, other than as permitted by DR 2-105;
"(6) relates to legal fees other than a standard consultation fee or a range of fees for specific types of services without fully disclosing all variables and other relevant factors;
"(7) conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
"(8) is intended or likely to result in a legal action or a legal position being taken or asserted merely to harass or maliciously injure another;

"(9) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;
"(10) contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived."

Consistent with the foregoing Draft Disciplinary Rules, the Committee has drafted changes in the Ethical Considerations of Canon 2, particularly EC 2-8 and EC 2-8A, which read as follows:

"EC2-8. Selection of a lawyer by a lay person should be informed. Advice and recommendations of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and proper publicity may be helpful. Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, e.g., name, including name of law firm and names of professional associates; addresses; telephone numbers; and office hours; (2) biographical data; and (3) description of the practice, e.g., one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; and a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized by the

rules of the authority having jurisdiction under state law over the subject of specialization.

"The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical data, does not provide that public benefit. For example, undue prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public does not serve the public need. Improper advertising may hinder informed selection of competent, independent counsel, and advertising involving excessive cost may unnecessarily increase fees for legal services.

"EC2-8A. Advertisements and other public communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Fee information usually will be incomplete and misleading to a lay person. Therefore, public communications should not attempt to give fee information beyond a statement of a standard consultation fee, a statement of a range of fees for specific types of

legal services, and the availability of credit arrangements. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees normally will be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. For example, it would be misleading to advertise a set fee for a divorce case without disclosing the fact that the particular lawyer will not accept employment by every potential client for that fee. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data based on past performance or prediction of future success is deceptive because it ignores important variables. The context of factual assertions and opinions should be clearly evident in all public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official by other than competent representation of a just cause. Commercial publicity and public communications should indicate the seriousness of undertaking any legal action. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the lay person with no legal background. Any commercial publicity for which payment is made should so indicate."

The Discussion Draft would permit a lawyer to state that he is limiting his practice to a particular area or field of law or is concentrating his practice

in one or more particular areas of the law, providing that his statements are not misleading. It also would permit lawyers to indicate other degrees and professional licenses.

The Discussion Draft does not distinguish television, radio, newspapers, magazines, and direct mail advertisements. All paid advertisements must be identified as such.

The suggested amendments would not affect existing prohibitions of solicitation of clients by lawyers.

Canon 2 *

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

EC 2-1 * * *

Recognition of Legal Problems

EC 2-2 The legal profession should assist lay[men] *persons* to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers [acting under proper auspices] should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. [Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include] Preparation of [institutional] advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs *should be motivated by a desire to benefit the public in its awareness of legal needs and selection of the most appropriate counsel.* [but a lawyer who participates in such activities should shun personal publicity.]

EC 2-3 Whether a lawyer acts properly in volunteering advice to a lay[man] *person* to seek legal

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* Additions italicized [Deletions Bracketed].

services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist lay[men] *persons* in recognizing legal problems. The advice is proper *whenever it is* [only if] motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. *It* [Hence, the advice] is improper if motivated by a desire to [obtain personal benefit, secure personal publicity, or] cause [litigation] legal action to be *taken* brought] merely to harass or injure another. *A lawyer best serves the public if he does not volunteer advice in order to obtain private gain in regard to employment.* [Obviously] A lawyer should not contact a non-client, *personally or through a representative,* [directly or indirectly,] for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer [generally should not himself] *and who then* accepts employment, compensation, or other benefit in connection with that matter *gives at least the appearance of impropriety.* However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, rela-

tives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems *and informing them of his services* should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for lay[men] *persons* should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer [*Generally*]

EC 2-6 • • •

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable lay[men] *persons* to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many lay[men] *persons* have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of

limited education or means, and others who have little or no contact with lawyers. *Lack of information about the availability of lawyers and the expense of initial consultation have been said to lead lay persons to avoid seeking legal advice.*

EC 2-8 Selection of a lawyer by a lay *person should be informed.* [man often is the result of the] Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—*and proper publicity may be helpful.* [. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.] *Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, e.g., name, including name of law firm and names of professional associates; addresses; telephone numbers; and office hours; (2) biographical data; and (3) description of the practice, e.g., one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more*

fields of law; and a statement that the lawyer or law firm specializes in a particular field of law practice but only if authorized by the rules of the authority having jurisdiction under state law over the subject of specialization.

The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical data, does not provide that public benefit. For example, undue prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public does not serve the public need. Improper advertising may hinder informed selection of competent, independent counsel, and advertising involving excessive cost may unnecessarily increase fees for legal services.

EC 2-8A *Advertisements and other public communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Fee information usually will be incomplete and misleading*

to a lay person. Therefore, public communications should not attempt to give fee information beyond a statement of a standard consultation fee, a statement of a range of fees for specific types of legal services, and the availability of credit arrangements. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees normally will be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. For example, it would be misleading to advertise a set fee for a divorce case without disclosing the fact that the particular lawyer will not accept employment by every potential client for that fee. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data based on past performance or prediction of future success is deceptive because it ignores important variables. The context of factual assertions and opinions should be clearly evident in all public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official by other than competent representation of a just cause. Commercial publicity and public communications should indicate the seriousness of undertaking any legal action. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the lay person with no legal background. Any

commercial publicity for which payment is made should so indicate.

[Selection of a Lawyer: Professional Notices and Listings]

EC 2-9 The traditional *regulation* of [ban against] advertising by lawyers [, which is subject to certain limited exceptions,] is rooted in the public interest. Competitive advertising [would encourage] *through which a lawyer seeks business by use of extravagant,* artful, self-laudatory [brashness] *or brash statements or appeals to fears and emotions* could mislead *and harm* the lay[man] *person.* Furthermore, [it] *public communications that* would [inevitably] produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers *would be harmful to society.* Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship, *being* [is] personal and unique, [and] should not be established as a result of pressures *or* [and] deceptions. [History has demonstrated that confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.] *The necessity of affording the public access to information relevant to legal rights has resulted in some relaxation of the former restrictions against advertising by lawyers. Those restrictions have long been relaxed in regard to law lists, announcement cards and institutional advertising and in certain other respects. Historically, those re-*

strictions were imposed to prevent deceptive publicity that would mislead lay persons, cause distrust of the law and lawyers, and undermine public confidence in the legal system, and all lawyers should remain vigilant to prevent such results. Only unambiguous information relevant to a layperson's decision regarding his legal rights or his selection of counsel is appropriate in public communications.

EC 2-10 [Methods of advertising that are subject to the objections stated above should be and are prohibited. However, t]*T*he Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding *falsity, deception, and misrepresentation. All publicity should be evaluated with regard to its effect on the layperson with no legal experience. The layperson is best served if advertisements only identify the lawyer and his location, indicate any limitation of practice, contain no misleading fee information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney-client relationship must result from a free and informed choice by the lay person. Unwarranted promises of benefits, overpersuasion, or vexatious or harassing conduct are improper.* [such objections. For example, a lawyer may be identified in the classified section of the telephone directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.]

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a [trade name or an assumed] name *which* could mislead lay[men] *persons* concerning the identity, responsibility, and status of those practicing thereunder *is not proper*. [Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.] For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 • • •

EC 2-13 • • •

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence

of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having *official recognition as a specialist*, [special training or ability,] other than [in the historically excepted] *the* fields of admiralty, trademark, and patent law *where holding one's self out as a specialist historically has been permitted. A lawyer may, however, publicly indicate a limitation of his practice or a concentration in one or more particular areas or fields of law if the public announcement clearly reflects that the lawyer has not been officially recognized or certified as a specialist.*

EC 2-15 * * *

DR 2-101 [Publicity in General] *Publicity and Advertising.*

(A) A lawyer shall not, [prepare, cause to be prepared,] *on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm,* use[,] or participate in the use of[,] any form of public communication [that contains professionally self-laudatory statements calculated to attract lay clients;] *containing a false fraudulent, misleading, deceptive or unfair statement or claim. A* [as used herein,] "public communication" *as used herein* includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, *book, law list or legal directory,* [magazine, or book]

(B) A [lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
(4) In and on legal documents prepared by him.
(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
(6) In communications by a qualified legal assistance organization, along with the bio-

graphical information permitted under DR 2-102(A)(6), directed to a member or beneficiary of such organization.]

false, fraudulent, misleading, deceptive or unfair statement or claim include a statement or claim which:

(1) contains a misrepresentation of fact;
(2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
(3) contains a client's laudatory statements about a lawyer;
(4) is intended or is likely to create false or unjustified expectations of favorable results;
(5) implies unusual legal ability, other than as permitted by DR 2-105;
(6) relates to legal fees other than a standard consultation fee or a range of fees for specific types of services without fully disclosing all variables and other relevant factors;
(7) conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
(8) is intended or likely to result in a legal action or a legal position being taken or asserted merely to harass or maliciously injure another;
(9) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;
(10) contains other representations or implications that in reasonable probability will

cause an ordinary, prudent person to misunderstand or be deceived.

(C) A lawyer shall not compensate or give anything of value to [representatives] a *representative* of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity [in a news item] *unless the fact of compensation is made known in such publicity.*

DR 2-102. Professional Notices, Letterheads, Offices and Law Lists.

(A) A lawyer or law firm [shall *may* not use *a* professional card[s], professional announcement card[s], office sign[s], letterhead[s], telephone directory listing[s], law list[s], legal directory listing[s], or *a* similar professional notice[s] or device[s, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR-2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.
(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients,

personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law offices. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact that he is a lawyer, addresses and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that adtional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

(6) A listing in a reputable law list or legal directory brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the law-

yer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.] *if it includes a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B).*

(B) A lawyer [in private practice] shall not practice under [a trade name,] a name that is misleading as to the identity, *responsibility or status of those* [of the lawyer or lawyers] practicing *thereunder, or is otherwise false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B), or is contrary to law.* [under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that] *However*, the name of

a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of *or public communication by* the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of *or public communications by* the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listing make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

[(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign or

professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.]

[(F)](*E*) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in law.

DR 2-103. Recommendation or *Solicitation* of Professional Employment.

(A) A lawyer shall not recommend employment[,] *or assist another person in recommending employment*, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer[.] *except that if success in asserting rights of defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept employment from those he is permitted under applicable law to contact for the purpose of obtaining their joinder.*

[(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1)

through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.]

[(D)](*B*) A lawyer shall not knowingly assist [a person or] *an* organization that furnished or pays for legal services to others to promote the use of his services or those of his partner, or associate, or any other lawyer affiliated with him or his firm, [except as permitted in DR-2-101 (B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.
(3) A lawyer referral service operated, sponsored, or approved by a bar association.
(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.
(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal services plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.]

as a private practitioner, if:

(1) *the promotional activity involves use of a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101(B); or*

(2) *the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.*

[(B)] (*C*) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay *for publicity and advertising permitted by DR 2-101 and* the usual and reasonable fees or dues charged by [any of the organizations listed in DR 2-103 (D).] *a lawyer referral service operated, sponsored, or approved by a bar association.*

[(E)] (*D*) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a lay[man] *person* that he should obtain counsel or take legal action shall not accept employment resulting from that advice [, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103 (D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.]

if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, deceptive or unfair within the meaning of DR 2-101 (B); or

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of bene-

fits, overpersuasion, overreaching, or vexatious or harrassing conduct.

DR 2-105. Limitation of Practice.

(A) A lawyer shall not hold himself publicly as, [a specialist or as limiting his practice, except as permitted under DR 2-102 (A) (6)] or *imply that he is, a recognized or certified specialist, except* as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may us the designation "Trademarks," "Trademarks Attorney," or "Trademark Lawyer," or any combination of those terms, on his letter head and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

[(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than one in a calendar year, but it may be published periodically in legal journals.]

[(4)] (*2*) A lawyer who is certified as a specalist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

(B) A statement, announcement, or holding out as limiting practice to a particular area or field of law or as concentrating practice to one or more particular areas or fields of law does not constitute a violation of DR 2-105 (A) if the statement, announcement or holding out does not include a statement or claim that is false, misleading, deceptive or unfair within the meaning of DR 2-101 (B).

* * * *

Definitions

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(7) "A Bar association" includes a bar association of specialists as referred to in DR 2-105 (A) (1) or [(4)] (*2*).

(8) "Qualified legal assistance organization" means [an office or organization of one of the four types listed in DR 2-103(D) (1)-(4), inclusive] *a legal aid, public defender, or military assistance office; a lawyer referral service; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at client's expense, is not in violation of any applicable law, and has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan.* [that meets all the requirements thereof.]

APPENDIX D

[SEAL] NEWS RELEASE

THE STATE BAR OF CALIFORNIA

FOR IMMEDIATE RELEASE September 20, 1976

FRESNO—Ralph J. Gampell, President-elect of the State Bar, told the Bar's Conference of Delegates today that proposed changes in Rules of Professional Conduct for lawyers would benefit the public by providing more useful information about what attorneys do.

He said a program the Bar's Board of Governors has recommended for adoption by the California Supreme Court is a carefully balanced proposal easing limitations on lawyer advertising which would better enable people to select attorneys to meet their needs. At the same time, he said, it would retain safeguards against false and misleading statements and abusive solicitation practices.

Gampell spoke in response to a request from the Conference yesterday that the Board withdraw its proposal for further modification.

Gampell pointed out that the Supreme Court must exercise its own independent judgment on the rule changes and he invited delegates, their local bars and any interested groups of individual to file their positions with the Court.

The new rules were adopted by the Bar's Board of Governors at their August meeting by a 12-3 vote.

Persons commenting upon or objecting to the specific rules proposed by the Board may file petitions and briefs in the Supreme Court in accordance with rule 952, subd. (c) of the California Rules of Court.

(Filed by the Clerk of the Court as *In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct* under Bar Misc. No. 3922.)

On August 26, 1976, subject to the approval of the Supreme Court of California, the Board of Governors repealed Rule 2-106 and adopted Rules 2-101, 2-102, 2-103 and 2-104, Rules of Professional Conduct, in the following form:

Rule 2-101 General Prohibitions Against Solicitation of Professional Employment.

(A) A member of the State Bar shall not solicit professional employment. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member or any other attorney.

(4) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(5) A member of the State Bar shall not solicit professional employment by advertisement or other means of commercial publicity nor shall the member authorize or permit others to do so in the member's behalf.

(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) This rule does not prohibit the following identification of a member of the State Bar as such as

well as by name and other reasonably pertinent data so long as such identification is not primarily directed to soliciting professional employment:

(1) In political advertisements;

(2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than for the solicitation of potential clients;

(3) In or on legal documents prepared by the member of the State Bar;

(4) In routine reports and announcements of a bona fide business, civic, professional or political organization in which the member serves as a director or officer or other official capacity; and

(5) In or on articles, books, treaties, pamphlets, brochures or other such publications and in advertisements thereof.

Rule 2-102. Public Information Communications.

(A) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in (B)(3) of this rule in any of the following:

(1) Law lists and legal directories approved by the Board of Governors pursuant to the following criteria:

(a) The information published therein is substantially in the form and language specified in (B)(3) of this rule.

(b) Each such law list or legal directory is a sepaarte collation which includes a rea-

sonable number of attorneys (from different sole law practices, law partnerships, professional associations of attorneys practicing law together or law corporations), considering the size of the legal community and the field or fields of law involved, listed together under the title "Attorneys" or "Lawyers" and under such additional subclassifications (including, but not limited to, geographical areas in which members reside or maintain offices or regularly practice, fields of law or certified specialists) as are not likely to be misleading or injurious to the public or the profession.

(c) Preferential prominence is not given to any member listed therein, by different size or character of type, underscoring or any other method used for emphasis or to attract attention.

(d) The information itself and the manner in which the information is presented or distributed (i) are not false, fraudulent, misleading, deceptive or unfair, (ii) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (iii) do not contain laudatory statements about the member or the member's firm, (iv) are not intended or likely to create false or unjustified expectations of favorable results, (v) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other pub-

lic body or official, (vi) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (vii) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (viii) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (ix) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(e) The law list or legal directory is published no more frequently than once quarterly.

(f) The law list or legal directory contains such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(g) The law list or legal directory clearly specifies for what period of time the information contained therein will be in effect.

(h) Law lists or legal directories may be published or distributed by commercial publishers of law lists or legal directories; bar associations; newspaper publishers; publishers of telephone directories; service clubs; charitable organizations; consumer organizations; labor unions; business, professional or trade associations; and entities enumerated in Rule 2-104, provided the person or entity publishing the law list or legal directory files with the State Bar a certification that it will not arbitrarily, capriciously or unreasonably exclude any member of the State Bar from its law list or legal directory.

A member shall not participate in the publication of information about the member or the member's firm in any law list or legal directory which the member knows or should know does not comply with the requirements of this rule and has not been approved by the Board of Governors or has been subsequently disapproved by the Board of Governors. Applications for approval of law lists and legal directories shall be made on such forms and pursuant to such rules as adopted and as from time to time amended by the Board of Governors.

(2) Classified sections of the telephone directory or directories for the geographical area or areas in which the member of the State Bar resides or maintains offices or regularly practices law, provided:

(a) All listings of members and members' firms therein are in a separate collation listed together under the title "Attorneys" or "Lawyers" and, if under subclassifications, are only arranged according to fields of law in which the member or the member's firm concentrates, primarily engages, or will accept cases, or in which the member is a certified specialist.

(b) The information permitted in (B) (3) of this rule is presented in substantially the form and language set forth therein.

(c) Introductory paragraphs or footnotes include such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(d) The presentation of the information does not violate the provisions of (1)(c) or (d) of (A) of this rule.

(3) Law lists or legal directories published periodically by the State Bar.

As used herein, "fields of law" include, but is not limited to, administrative agency law, admiralty or maritime law, antitrust law, (field(s) of) appellate practice, bankruptcy law, business law, (field(s) of) civil practice, civil rights law, condemnation law, contract law, copyright law, corporation and partnership law, creditor's rights law, criminal law, debtor's rights law, education law, employment law, entertainment law, environmental law, estate planning, family law, general practice, immigration and naturalization law, juvenile law, labor law, landlord and tenant law, (field(s) of) malpractice law, patent law, pension and profit sharing law, personal injury law, probate law, real estate law, senior citizens law, social security law, taxation law, trademark law, (field(s) of) trial practice, trust law, unemployment insurance law, veterans law, welfare law, worker's compensation law, zoning law.

(B) A member of the State Bar may participate in the publication of any of the information about the

member or the member's firm specified in paragraph (3) of this subdivision to the extent permitted in (A) of this rule and in Rules 2-103 and 2-104, provided:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injury another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (i) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Gov-

ernors may use the terms "certified specialist", "specialist", "speciality", "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

(3) Such information is presented in substantially the following form and language:

(a) Name of the member of the State Bar;

Form: "[name of member]"

(b) Name under which the member practices, which may be accompanied by a statement clarifying that the practice is (i) a sole practice, (ii) a law partnership, (iii) an association of attorneys or (iv) a public interest law firm which has been ruled exempt from federal income tax under the Internal Revenue Code; provided that if the name under which the member practices is a law corporation, the statement clarifying that the practice is a law corporation shall be given and shall comply with the provisions of section 6164 of the Business and Professions Code;

Form: "[name of member's firm, e.g. 'Legal Clinic of Doe and Roe', 'Doe and Roe, Lawyers'], ['a sole practitioner' or 'a law partnership' or 'an association of attorneys' or 'a law corporation' or 'public interest law firm']"

(c) The name(s) of predecessor law firm(s) in a continuing line of succession;

Form: "formerly: [name(s) of predecessor law firm(s) listed in reverse chronological order]"

(d) Address(es) and telephone number(s) of the office(s) maintained by the member or the member's firm for the practice of law;

Form: "[address(es)], [telephone number(s)]"

(e) Office hours regularly maintained by the member or the member's firm for the practice of law, and a statement that the member is available to meet with clients or potential clients at times other than the specified office hours;

Form: "office hours: [days and hours regularly maintained], [and/or 'by appointment'] [telephone answered:] [days and hours regularly answered or '24 hours']"

(f) A statement that the member is (or is not) willing to meet with potential clients at locations other than the member's office(s);

Form: "interviews ['not'] limited to office(s)"

(g) Language(s) other than English spoken fluently by the member;

Form: "fluent in: [name(s) of language(s)]"

(h) Language(s) other than English for which the member or the member's firm provides interpreter(s), and a statement whether such interpreter(s) are provided without charge;

Form: "['free'] [name(s) of language(s)] interpreter(s) provided"

(i) Cost of an initial interview for a specified period of time, or a statement that such interview for a specified period of time is without charge;

Form: "initial interview: ['½ hour' or '1 hour' or other specified period of time], [dollar amount or 'free']"

(j) A statement that the member or the member's firm does (or does not) provide a written fee schedule, and if such fee schedule is provided a statement whether such fee schedule is provided without charge;

Form: "['free'] written fee schedule available"

(k) A statement that the member or the member's firm is (or is not) willing to provide written fee estimates for specific services prior to providing such services, and if such fee estimates are provided a statement whether such fee estimates are provided without charge;

Form: "['free'] written fee estimates given"

(l) Field(s) of law practiced by the member or the member's firm in which fees are set by statute;

Form: "[field(s) of law] fees set by statute"

(m) Hourly fee(s) or range of hourly fee(s) charged by the member or the member's firm, *together with* all of the variables and other relevant factors that could affect the amount(s) of the stated fee(s);

Form: ["hourly fee(s), together with all variables and relevant factors]: [dollar amount(s)]"

(n) Fee(s) or range(s) of fee(s) charged by the member or the member's firm for specific types of services, *together with* all of the variables and other relevant factors that could affect the amounts of the stated fee(s);

Form: "[type(s) of service(s), together with all variables and relevant factors]: [dollar amount(s)]"

(o) Type(s) of case(s) that the member or the member's firm is willing to accept on a contingency fee basis, *together with* the terms of a typical contingency fee contract (including, without limitation, how both investigation costs and litigation costs are computed and paid) *and* all of the variables and other relevant factors that could affect the stated terms;

Form: "contingency fee case(s): [type(s) of case(s)], [terms of contingency fee contract(s), together with all variables and relevant factors]"

(p) Name(s) of credit card(s) accepted by the member or the member's firm in payment of fees (or a statement that credit cards are not accepted);

Form: "[name(s) of credit card(s)] accepted"

(q) A statement that the member or the member's firm regularly accepts (or does not regularly accept) installment payments of fees on mutually satisfactory terms;

Form: "installment payments accepted on mutually satisfactory terms"

(r) A statement that the member or the member's firm is (or is not) willing to submit any fee dispute(s) to arbitration, and if so willing a statement that such arbitration is or is not binding;

Form: "fee disputes submitted to [binding] arbitration"

(s) A statement that the member holds current certificate(s) as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors;

Form: "certified specialist in [field(s) of law]"

(t) A statement that the member is registered to practice in patent matters before the United States Patent and Trademark Office;

Form: "patents" or "patent law" or "registered to practice in patent matters"

(u) Field(s) of law to which the member and/or member's firm limits the member's and/or firm practice;

Form: "['lawyer's'] ['firm's'] practice limited to: [field(s) of law]"

(v) One or more fields of law in which the member or the member's firm concentrates or primarily engages (not to exceed (i) in the case of a member, three, and (ii) in the case of a firm, three per member or ten, whichever is less);

Form: "['lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law]"

(w) One or more fields of law in which the member or the member's firm accepts cases, *together with* the information set forth in (v) above;

Form: "['lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law] and accepts cases in: [field(s) of law]"

(x) A statement that the member or the member's firm is interested in providing professional services under group legal services

plan(s) which the member or the member's firm does not actually serve;

Form: "interested in serving group plans"

(y) A statement that the member or the member's firm is interested in providing professional services under prepaid legal services plan(s) which the member or the member's firm does not actually serve;

Form: "interested in serving prepaid plans"

(z) One or more fields of law in which the member and/or the member's firm will not accept cases;

Form: "['lawyer'] ['firm'] will *not* accept cases in: [field(s) of law]"

(aa) Number of active members of the State Bar (including the member), who are associated with the member or the member's firm in the practice of law on a substantially full-time basis;

Form: "number of California lawyers: [whole number]"

(bb) Name(s) of (i) active member(s) of the State Bar who are, (ii) deceased member(s) of the State Bar who have been and (iii) with their consent, living member(s) of the State Bar who have been, associated with the member or the member's firm in the practice of law, and a statement with regard to each, that he or she is or was (i) a full-time partner, (ii) a full-time associate or (iii) has a continuing relationship with the member or the member's

firm other than as a full-time partner or a full-time associate ("of counsel"), *together with* the pertinent dates with regard to any such member who is not currently associated with the member or the member's firm in the practice of law;

Form: "['partner(s):'] [name(s) and, if applicable, dates of former association in years];

['associate(s):'] [name(s) and, if applicable, dates of former association in years];

['of counsel:'] [name(s) and, if applicable, dates of former association in years]"

(cc) Date and place of the member's birth;

Form: "born: [date, place]"

(dd) State(s) and federal court(s) in which the member is entitled to practice law, *together with* the date(s) of admission to such practice;

Form: "admitted to practice in: [state, year]; [state, year]; [name of federal court, year]; [name of federal court, year]; [etc.]"

(ee) Name(s) of other professional license(s) currently or formerly held by the member, *together with* the state(s) issuing the license(s) and the pertinent dates;

Form: "other license(s): [official title or abbreviation of license(s) *currently* held], [state(s) of issuance], [first year of member's continuous holding of the license(s)]

'—present'; [official title or abbrebiation of license(s) *formerly* held], [state(s) of issuance], [dates in years that license(s) were held]"

(ff) Name(s) of school(s) from which the member has graduated, and with regard to each such school, a statement describing the nature of the school, the date the member graduted, the degree(s) the member received and any scholastic distinction(s) the member received;

Form: "['college' or 'law school' or 'engineering school' or other appropriate description of the nature of the school attended by the member]: [name of school; year of graduation, degree(s) received, official name or abbreviation of scholastic distinction(s) received]"

(gg) Official title(s) of public or quasi-public office(s) or post(s) of honor currently or formerly held by the member, *together with* the pertinent dates;

Form: "[official title or abbreviation of office(s) or post(s) of honor *currently* held], [year member's current term began] '—present'; [official title or abbreviation of office(s) or post(s) of honor *formerly* held], [dates in years that office or post was held]"

(hh) Name(s) of the branch(es) of the armed forces of the United States in which the member served, and the pertinent dates of such service;

Form: "[name(s) of branch(es)], [dates of service in years]"

(ii) Publication(s) authored by the member;

Form: "author: [title of work authored, title of publication, date of publication]"

(jj) Teaching position(s) currently or formerly held by the member, *together with* the pertinent dates;

Form: "[official title or abbreviation of position *currently* held], [name of school], [first year of member's continuous service in position] '—present'; [official title or abbreviation of position *formerly* held], [name of school], [dates in years that position was held]"

(kk) Name(s) of organization(s) or component(s) thereof to which the member belongs or belonged, and the pertinent dates of such membership;

Form: "member: [official name(s) or abbreviation(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '—present'; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '—present'; [official name(s) or abbreviation(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years];

[official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]"

(ll) Name(s) of position(s) of responsibility currently or formerly held by the member in organization(s), *together with* the pertinent dates;

Form: "[official name(s) or abbreviation(s) of position(s) *currently* held] [first year of member's continuous service in position(s)] '—present'; [official name(s) or abbreviation(s) of position(s) *formerly* held], [dates in years that position was held]"

(C) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

Rule 2-103. Professional Announcements, Door and Office Signs, Professional Cards, Letterheads and Trade Names.

Only to the extent permitted in this rule:

(A) A member of the State Bar available to act as a consultant to or as an associate of other members of the State Bar may distribute to other members of the State Bar and publish in legal journals circulated or distributed primarily to members of the State Bar or lawyers licensed in other jurisdictions an anouncement in modest and dignified form of such availability setting forth any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) A member of the State Bar or a member's law firm may mail to lawyers, clients, former clients, personal friends and relatives a brief professional announcement card in modest and dignified form stating new or changed associations or addresses, change of firm name, or similar matters, pertaining to the professional office of the member or of the member's firm and any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein. The announcement may be distributed only once for any new or changed association or address, change of firm name, or similar matters.

(C) A member of the State Bar or a member's law firm may have a sign in modest and dignified form on or near the door of the member's or firm's law office and in the building directory identifying the law office. The sign may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(D) A member of the State Bar or a member's law firm may use a professional card in modest and dignified form and only for the purpose of identification. The professional card of a member may identify the member by name as a lawyer and give the member's address(es), telephone number(s) and give the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b). The professional card of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates. The card may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(E) A member of the State Bar or a member's law firm may use stationery with a professional letterhead in modest and dignified form. The letterhead of a member may identify the member by name and as a lawyer and give the member's address(es), telephone number(s), the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b) and the names of members and associates thereof. A letterhead of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession. A member

of the State Bar may be designated "of counsel" on a letterhead if the member has a continuing relationship with a lawyer or law firm other than as a full-time partner or associate. The letterhead may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(F) A member of the State Bar who is engaged both in the practice of law and another profession or business shall not so indicate on his or her office sign, professional card or letter head, nor shall the member identify himself or herself as a member of the State Bar in connection with the member's other profession or business.

(G) A member of the State Bar or a member's law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the member or the firm devotes a substantial amount of professional time in the representation of that client, provided the member of the State Bar uses such letterhead only for correspondence relating to the professional representation of the client the member represents as general counsel unless the member performs no legal services for anyone other than the client the member represents as general counsel.

(H) A member of the State Bar or a member's law firm may practice under a fictitious name, provided that such name (1) includes the member's name or the name(s) of other member(s) of the

State Bar who are associated with the member or the member's firm in the practice of law or the name(s) of deceased or retired member(s) of the firm or of a predecessor firm in a continuing line of succession or the name of a partnership within the meaning of (1) of this rule or, in the case of a law corporation, complies with the provisions of section 6164 of the Business and Professions Code, (2) is not false, fraudulent, misleading, deceptive or unfair, (3) is not likely to mislead or deceive, (4) does not contain laudatory statements about the member or the member's firm, (5) is not intended or likely to create false or unjustified expectations of favorable results, (6) does not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (7) is not intended or likely to result in a legal action or position being taken or asserted primarily to harass or maliciously injure another, (8) is not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, and (9) does not contain representations or implications that are likely to deceive or to cause misunderstanding.

(I) A partnership may be formed or continued between or among lawyers licensed in different jurisdictions, provided all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions, and further provided that (1) each person occupying each office of the firm located in California who shall hold himself or herself out as a member or associate of such firm shall be an active member of the State Bar and (2) each person holding himself or herself out as a member of the firm shall be a bona fide partner in such firm, with a bona fide share in the profits, liabilities and professional responsibilities thereof and (3) at least one person occupying each office of the firm located in California shall be such a bona fide partner and an active member of the State Bar.

Rule 2-104. Public, Group and Prepaid Legal Service Programs.

(A) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program or a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect to their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or programs from stating in response to inquiries as to the identity of such member of the State Bar any of the information con-

cerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) The participation of a member of the State Bar in a lawyer referral service established, sponsored, supervised and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California, as adopted and as from time to time amended by the Board of Governors is not, of itself, a violation of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such lawyer referral service from identifying a member of the State Bar who is participating in that service, and stating any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein, in connection with the making of a requested referral in conformity with the said Minimum Standards. A member of the State Bar may permit his or her name to be listed in lawyer referral service offices according to the fields of law in which the member will accept referrals and in such manner as is proper under the standards which the Board of Governors may from time to time promulgate.

(C) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such

group, is not of itself in violation of these Rules of Professional Conduct if the arrangement:

(1) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his or her choice,

(2) is so administered and operated as to prevent

(a) such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to the member's client.

(b) such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder,

(c) unlicensed persons from practicing law thereunder, and

(d) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group or the nature and extent of the legal services or both, without any identification of the member or members of the State Bar rendering or to render such services.

Nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member

or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102 (B)(3) in substantially the form and language set forth therein.

As used in this rule, a group means a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise and including employees of a single employer, whose primary purpose and activities are other than the rendering of legal services.

A member of the State Bar furnishing legal services pursuant to an arrangement for the provision thereof shall advise the State Bar thereof within 60 days after the entering into the same. Thereafter the member shall advise the State Bar, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of legal services offered pursuant to the arrangement. Annually on January 31, the member shall report to the State Bar, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services shall be confidential.

(D) Section a. The furnishing of legal services by a member of the State Bar pursuant to an arrangement for pre-paid legal services or other plan for defraying the costs of professional services of attorneys, is not of itself in violation of these Rules of Professional Conduct, if:

(1) the arrangement was established by or at the request of a group defined in Rule 2-104(C) of these rules for the individual members of the group and other wise complies with Rule 2-104 (C); or

(2) the arrangement is developed, administered and operated by a non-profit organization, incorporated or otherwise and

(a) permits any client to obtain legal services independently of the arrangement, from any attorney of his or her choice; and

(b) is so developed, administered and operated that

(i) the panel of attorneys furnishing legal services thereunder consists of at least 20% or 1000 of the active members of the State Bar engaged in private practice and maintaining their principal offices in the geographical area served by the arrangement, whichever is the lesser number, but in no event less than 15 such active members; and

(ii) the panel of attorneys furnishing the legal services thereunder is open to any active member of the State Bar engaged in practice in the geographical

area served by the arrangement, provided that a panel of attorneys which is open to all of the members of a local bar association is deemed to comply with this requirement if membership in that bar association is open to any active member of the State Bar engaged in practice in said geographical area, and

(iii) the client shall have the right to select any attorney on the panel to perform the legal services provided that the attorney consents to perform the legal services, and

(iv) any referral of a client to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement shall be at the request of the client and in a manner consistent with those provisions of the "Minimum Standards for a Lawyer Referral Service in California" respecting the making of referrals; and

(c) is so developed, administered and operated as to prevent

(i) a third party from interfering with or controlling the performance of duties of the member of the State Bar to the member's client, and

(ii) a third party from receiving any part of the consideration paid to the member of the State Bar for furnishing legal services thereunder except

as permitted by Rules 2-108 and 3-102 of these rules, and

(iii) unlicensed persons from practicing law thereunder, and

(iv) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar; provided further that all publicizing and soliciting activities concerning the arrangement, except publicizing activities directed at persons entitled to receive legal services under the arrangement, shall terminate at such time as the total number of persons entitled to receive legal services under all arrangements of which the State Bar is advised pursuant to Rule 2-104 (C) of these rules is equivalent to the total number of persons entitled to receive legal services under all arrange-

ments reported to the State Bar pursuant to Section b.1.(b) of this Rule 2-104(D). For the purposes of this subsection (c)(iv) "persons" shall not include those who are eligible to receive legal services solely by reason of being a spouse or dependent family member.

Once the requirements of Section a.2.(b)(i) of this Rule 2-104(D) have been satisfied, nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this section, "geographical area" means any one of the following: (1) the state; (2) one or more municipal court judicial districts; (3) any combination of one or more municipal court judicial districts together with one or more counties; (4) one or more counties; (5) one or more of the superior court districts in a county of 5,000,000 or more persons according to the latest federal census.

Section b. Subject to the provisions of Section c. of this Rule 2-104(D), a member of the State Bar who has agreed to furnish legal services pursuant to an arrangement for prepaid legal services or other plan for defraying the costs of professional services of attorneys, shall

(1) Within 60 days after entering into such agreement, file a notice thereof with the State Bar, and thereafter file with the State Bar, on the report forms provided by it and within 60 days after receiving such forms, the following under either (a) or (b), as applicable:

(a) If the arrangement was established by or at the request of a group pursuant to Section a.1. of this Rule 2-104(D):

(i) the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement;

(ii) if a person or entity other than the group itself is administering the arrangement, the name and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and

(iii) a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services

under the arrangement, (B) for periodically obtaining from those being served by the arrangement their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.

(b) If the arrangement is developed, administered and operated by a non-profit organization pursuant to Section a.2. of this Rule 2-104(D):

(i) the name and office address of the non-profit organization and, if incorporated, a copy of its articles of incorporation and by-laws;

(ii) the geographical area served by the arrangement;

(iii) a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement;

(iv) the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement;

(v) if individuals, as distinguished from members of a group, are being served by the arrangement, then the number of such individuals and a copy

of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and

(vi) a description of the methods and procedures under the arrangement, if any, as required under 1.(a)(iii) of this section.

(2) Annually thereafter, by January 31, file with the State Bar, on the report forms provided by it, the following: the number of persons to whom the member rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents the member filed with the State Bar under either 1.(a) or 1.(b) of this Section b.

Section c. Any notice, information or documents required to be filed by a member of the State Bar pursuant to Section b. of this Rule 2-104(D) need not be filed by such member personally if, within the time periods specified in that section, such notice, information or documents are filed on the member's behalf by either: (1) the group's officer, agent, or employee having primary responsibility for the arrangement established pursuant to Section a.1. of this Rule 2-104(D), or if such arrangement is being administered by a person or entity other than the group, by such person or entity; (2) the non-profit organization administering the arrangement pursuant to Section a.2. of this Rule 2-104(D).

When such notice, information or documents are so filed on behalf of two or more members of the State Bar for any one arrangement, they shall be consolidated where possible in a single notice or reporting form and documents already on file may be incorporated by reference so long as there are no changes therein.

Section d. Any notice, information or documents received by the State Bar pursuant to Sections b. or c. of this Rule 2-104(D) shall be public, whether or not also received by the State Bar pursuant to Rule 2-104(C) of these rules.

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